

16C C.J.S. Constitutional Law VII XVIII Refs.

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

A. In General

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16C C.J.S. Constitutional Law § 1610

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions


XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

A. In General

§ 1610. General considerations relative to constitutional rights in criminal proceedings and prosecutions

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West's Key Number Digest

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In a criminal proceeding or prosecution, the constitutional guaranty of due process embodies that fundamental fairness essential to the very concept of justice; due process of law consists of a law creating or defining the offense, an impartial tribunal of competent jurisdiction, accusation in due form, notice and opportunity to defend, trial according to established procedure, and discharge unless found guilty.

In a criminal proceeding or prosecution, the constitutional guaranty of due process embodies that fundamental fairness which is essential to the very concept of justice.¹ The due process provision of the Fourteenth Amendment, just as that of the Fifth Amendment, is intended to guarantee procedural standards adequate and appropriate to protect at all times people charged with, or suspected of, crime.² Accordingly, in any criminal case, the person accused may not be deprived of life, liberty, or property except by due process of law,³ however bad his or her behavior,⁴ even though he or she is guilty,⁵ and regardless of the nature of the crime.⁶ The law by which the question of due process is determined is the law of the jurisdiction where the offense has been committed and the trial is had.⁷

Broadly stated, due process of law in a criminal case requires a law creating or defining the offense, a court of competent jurisdiction, accusation in due form, notice and opportunity to defend, trial before an impartial judge or judge and jury according to established criminal procedure, and a right to be discharged unless found guilty.⁸ Stated in a more specific way, due process requires a timely and ample notice, and an opportunity to defend and be heard,⁹ and that a person charged with an offense be duly advised of the nature and cause of the accusation against him or her.¹⁰ Thus, the right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the accusations.¹¹ Where these requirements are met, there is no violation of the guaranty of due process of law¹² regardless of whether an appellate court may approve of the verdict of the jury and the judgment based on it.¹³

Due process requires that criminal prosecutions be conducted according to established criminal procedures,¹⁴ and an accused must be afforded a remedy by which he or she may effectively assert his or her fundamental right to due process.¹⁵ A defendant's right to due process is a constitutional guaranty, and it may not be granted or withheld according to the court's discretion¹⁶ although reasonable restrictions on the exercise of a constitutional right are permissible.¹⁷

In criminal matters, due process requirements must be rigidly adhered to.¹⁸ Whether a defendant's constitutional right to due process of law has been infringed in a criminal prosecution will be determined on the particular facts of each case,¹⁹ but any substantial doubt as to a possible deprivation of due process of law must be resolved in favor of the defendant.²⁰ A claim of the denial of due process cannot be predicated on the failure of a defense move,²¹ however, and there is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he or she has been brought to trial against his or her will.²²

Identifiable prejudice.

In most cases, claims of the deprivation of due process rights require a special showing of identifiable prejudice to an accused affecting his or her substantial rights.²³ Nevertheless, there are certain procedures employed by the states which involve such a probability of prejudice that they are deemed inherently lacking in due process.²⁴

Waiver of constitutional rights.

Where a claim of a fundamental right under the Federal Constitution is at stake, a strict standard with respect to waiver by the defendant of such right must be applied;²⁵ however, due process does not compel the same strict standard when a state-conferred right is at stake.²⁶

Pretrial intervention programs and drug-diversion statutes.

Where a liberty interest is implicated in problem-solving-court proceedings, such as drug court, an individual's due process rights must be respected.²⁷ Under a pretrial intervention program, in which a defendant instead of being prosecuted for the offense committed is admitted to a rehabilitation program for a specified period of time, where the State files a motion to terminate the defendant's pretrial diversionary status and to return him or her to the normal course of prosecution, due process principles apply to such termination proceedings though due process does not require that a pat procedural formula be applied to every termination hearing regardless of the facts.²⁸ Thus, due process principles apply to pretrial intervention program termination hearings, inasmuch as the loss of diversionary status entails the loss of conditional liberty attendant upon participation in the

program and the loss of freedom from prosecution, as well as imposing a possibility of adjudication of guilt and the stigma of conviction and the possibility of an unfavorable presentence report.²⁹

Likewise, a statute providing that when the results of the evaluation obtained indicate that the defendant is a drug-dependent person within the meaning of the statute, and the results of the evaluation indicate that such person may benefit in a substantial manner from treatment for drug dependence, the prosecutor, with the concurrence of the court, may direct the defendant to receive treatment as a contingent alternative to prosecution, and if the defendant refuses treatment, criminal proceedings will be resumed, does not confer upon the defendant the right to choose treatment in lieu of prosecution;³⁰ therefore, the trial court's denial of the defendant's motion for diversion does not deny him or her due process.³¹

CUMULATIVE SUPPLEMENT

Cases:

Proceedings in compliance with Indian Civil Rights Act (ICRA) sufficiently ensure the reliability of tribal-court convictions; therefore, the use of those convictions in a federal prosecution does not violate a defendant's Fifth Amendment right to due process. *U.S.C.A. Const.Amend. 5*; Indian Civil Rights Act of 1968, § 202(a)(8), *25 U.S.C.A. § 1302(a)(8)*. *U.S. v. Bryant*, 136 S. Ct. 1954 (2016).

Resident who was shot at, but not hit, by police officer who was among a group of law enforcement agents executing search warrant at his house, did not suffer violation of his substantive due process rights as result of officer's actions, since there was no showing of an executive abuse of power that shocked the conscience, as an officer in the situation would have reasonably believed that fellow officers were being fired upon and that their lives were in danger, after hearing lead officer's commands to resident to show his hands, without any response from resident indicating submission, and then two quick bursts of gunfire. *U.S. Const. Amend. 14. Hammett v. Paulding County*, 875 F.3d 1036 (11th Cir. 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 *U.S.—California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); *Moldowan v. City of Warren*, 578 F.3d 351 (6th Cir. 2009).
Cal.—City of Los Angeles v. Superior Court, 29 Cal. 4th 1, 124 Cal. Rptr. 2d 202, 52 P.3d 129 (2002).
Ga.—Tanksley v. State, 323 Ga. App. 299, 743 S.E.2d 585 (2013), cert. denied, (Nov. 18, 2013).
Minn.—McCollum v. State, 640 N.W.2d 610 (Minn. 2002).
Protection against fundamentally unfair treatment
The Due Process Clause protects defendants against fundamentally unfair treatment by the government in criminal proceedings.
Mont.—State v. Betterman, 2015 MT 39, 378 Mont. 182, 342 P.3d 971 (2015).
Prevailing notions of fundamental fairness
Pursuant to the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness.
U.S.—McCarthy v. Pollard, 656 F.3d 478 (7th Cir. 2011).
Miss.—Hardy v. State, 137 So. 3d 289 (Miss. 2014).
Tenn.—State v. Jackson, 444 S.W.3d 554 (Tenn. 2014).
At its core, due process is the right to fairly present defense
U.S.—U.S. v. Juan, 704 F.3d 1137 (9th Cir. 2013).
Community's sense of fair play and decency

Judges are not free in defining due process to impose on law enforcement officials their personal and private notions of fairness and to disregard limits that bind judges in their judicial function, rather, a judge's task is to determine whether actions complained of violate those fundamental conceptions of justice which lie at the base of civil and political institutions and which define a community's sense of fair play and decency.

U.S.—*U. S. v. Lovasco*, 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977).

Lawful exercise of rights

The Due Process Clause prohibits the government from punishing the defendant for his or her lawful exercise of his or her rights regardless of how small the punishment may be.

Wis.—*State v. Church*, 2003 WI 74, 262 Wis. 2d 678, 665 N.W.2d 141 (2003).

2 U.S.—*Chambers v. State of Florida*, 309 U.S. 227, 60 S. Ct. 472, 84 L. Ed. 716 (1940).

Iowa—*State v. Becker*, 818 N.W.2d 135 (Iowa 2012).

Factfinding process

(1) Due process requires the use of procedures in criminal cases which are so fundamental that their absence impairs or discredits the factfinding process.

Or.—*State v. Gann*, 254 Or. 549, 463 P.2d 570 (1969).

(2) For purposes of determining what process is due in criminal proceedings, the accused has at stake not only the possible loss of his or her liberty, but the certainty of stigmatization upon conviction, and the State, in order to maintain the respect and confidence of the community in the criminal justice system, has a genuine interest in seeing that every individual has the confidence that he or she will not be adjudged guilty of a criminal offense unless the factfinder is convinced of his or her guilt with the utmost certainty.

Me.—*State v. Maier*, 423 A.2d 235 (Me. 1980).

3 U.S.—*Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952).

Mont.—*State v. Winkle*, 2002 MT 312, 313 Mont. 111, 60 P.3d 465 (2002).

Wis.—*D. H. v. State*, 76 Wis. 2d 286, 251 N.W.2d 196 (1977).

4 U.S.—*Parr v. U.S.*, 363 U.S. 370, 80 S. Ct. 1171, 4 L. Ed. 2d 1277 (1960).

5 U.S.—*Ledbetter v. Warden, Md. Penitentiary*, 368 F.2d 490 (4th Cir. 1966).

N.Y.—*People v. Bennett*, 65 A.D.2d 801, 410 N.Y.S.2d 304 (2d Dep't 1978).

Guilt or innocence irrelevant

In determining whether the procedure by which the State has determined the guilt of an accused person conforms to the requirements of due process, the question of whether the accused is in fact innocent or guilty is irrelevant and need not be considered.

U.S.—*U. S. ex rel. Collins v. Claudy*, 204 F.2d 624 (3d Cir. 1953).

Ark.—*Ruiz v. State*, 265 Ark. 875, 582 S.W.2d 915 (1979).

6 Kan.—*Application of Jones*, 228 Kan. 90, 612 P.2d 1211 (1980).

Heinousness of crime not relevant

U.S.—*U. S. ex rel. Floyd v. Wardens, Pontiac and Joliet Correctional Centers*, 480 F. Supp. 232 (N.D. Ill. 1979).

N.Y.—*People v. Rao*, 73 A.D.2d 88, 425 N.Y.S.2d 122 (2d Dep't 1980).

7 Md.—*Slansky v. State*, 192 Md. 94, 63 A.2d 599 (1949).

Nev.—*State v. Fouquette*, 67 Nev. 505, 221 P.2d 404 (1950).

State courts

The primary responsibility for protecting the rights guaranteed by the Fourteenth Amendment to the Federal Constitution to persons accused of crime in state courts, and for devising effective corrective processes where such rights have been violated, rests on the states.

U.S.—*Scott v. Henslee*, 104 F. Supp. 218 (E.D. Ark. 1952).

8 Me.—*Danforth v. State Dept. of Health and Welfare*, 303 A.2d 794 (Me. 1973).

R.I.—*Mills v. Howard*, 109 R.I. 25, 280 A.2d 101 (1971).

As to the creation or definition of offenses, generally, see § 1615.

Conduct must be prohibited

The State cannot, consistently with the Due Process Clause, convict a defendant for conduct that its criminal statute, as properly interpreted, does not prohibit.

U.S.—*Fiore v. White*, 531 U.S. 225, 121 S. Ct. 712, 148 L. Ed. 2d 629 (2001).

9 U.S.—*Williams v. People of State of N.Y.*, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949).

Ill.—*People v. McDonald*, 401 Ill. App. 3d 54, 339 Ill. Dec. 712, 927 N.E.2d 253 (1st Dist. 2010).

Iowa—[State v. Hernandez-Lopez](#), 639 N.W.2d 226 (Iowa 2002).

Kan.—[State v. Ramirez](#), 299 Kan. 224, 328 P.3d 1075 (2014).

As to due process concerns with regard to a defendant's reasonable time to investigate, prepare, and present a defense, see § 1697.

Meaningful opportunity to defend

Both the Sixth Amendment of the Federal Constitution and the due process guarantees of the state and federal constitutions require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them.

Cal.—[People v. Williams](#), 56 Cal. 4th 630, 156 Cal. Rptr. 3d 214, 299 P.3d 1185 (2013), petition for certiorari filed, 134 S. Ct. 1279, 188 L. Ed. 2d 298 (2014).

When infringement upon right permissible

A trial court may infringe upon a defendant's due process right to present a complete defense when the defense theory is unsupported, speculative, and far-fetched and could thereby confuse or mislead the jury.

Ky.—[Meece v. Com.](#), 348 S.W.3d 627 (Ky. 2011).

10 U.S.—[Faretta v. California](#), 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

Iowa—[Committee on Professional Ethics and Conduct of State Bar Ass'n v. Behnke](#), 276 N.W.2d 838 (Iowa 1979).

Wis.—[State v. Cheers](#), 102 Wis. 2d 367, 306 N.W.2d 676 (1981).

11 U.S.—[Chambers v. Mississippi](#), 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

Conn.—[State v. Rolon](#), 257 Conn. 156, 777 A.2d 604 (2001).

Minn.—[McCollum v. State](#), 640 N.W.2d 610 (Minn. 2002).

Meaningful opportunity to present complete defense required

U.S.—[Blackston v. Rapelje](#), 780 F.3d 340 (6th Cir. 2015); [U.S. v. Beavers](#), 756 F.3d 1044, 94 Fed. R. Evid. Serv. 1104 (7th Cir. 2014); [U.S. v. Renzi](#), 769 F.3d 731 (9th Cir. 2014).

Ariz.—[State v. Boyston](#), 231 Ariz. 539, 298 P.3d 887 (2013), cert. denied, 134 S. Ct. 178, 187 L. Ed. 2d 122 (2013).

Neb.—[State v. Henderson](#), 289 Neb. 271, 854 N.W.2d 616 (2014), petition for certiorari filed (U.S. Apr. 14, 2015).

Tenn.—[State v. Jackson](#), 444 S.W.3d 554 (Tenn. 2014).

Wis.—[State v. Weissinger](#), 2014 WI App 73, 355 Wis. 2d 546, 851 N.W.2d 780 (Ct. App. 2014).

Right to present defense not absolute

A defendant has a fundamental due process right to present a defense; however, that right is not absolute, for a defendant must comply with established rules of procedure and evidence designed to assure both fairness and reliability.

U.S.—[U.S. v. Mi Sun Cho](#), 713 F.3d 716 (2d Cir. 2013).

Fair hearing necessary

The failure to give the accused a fair hearing violates the minimal standards of due process.

Mo.—[State v. Baumruk](#), 85 S.W.3d 644 (Mo. 2002).

12 U.S.—[Paterno v. Lyons](#), 334 U.S. 314, 68 S. Ct. 1044, 92 L. Ed. 1409 (1948).

Fla.—[Akins v. Hamlin](#), 327 So. 2d 59 (Fla. 1st DCA 1976).

Wis.—[Milwaukee County v. Proegler](#), 95 Wis. 2d 614, 291 N.W.2d 608 (Ct. App. 1980).

Due process satisfied

Due process of law is satisfied when one present in court is convicted of a crime after having been fairly apprised of the charges against him or her and after a fair trial in accordance with constitutional procedural safeguards.

U.S.—[Frisbie v. Collins](#), 342 U.S. 519, 72 S. Ct. 509, 96 L. Ed. 541 (1952).

13 U.S.—[Frank v. Mangum](#), 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed. 969 (1915).

S.C.—[State v. Brown](#), 178 S.C. 294, 182 S.E. 838 (1935).

14 Miss.—[Flowers v. State](#), 773 So. 2d 309 (Miss. 2000).

15 La.—[State v. Reaves](#), 376 So. 2d 136 (La. 1979).

16 Cal.—[Sallas v. Municipal Court](#), 86 Cal. App. 3d 737, 150 Cal. Rptr. 543 (1st Dist. 1978).

17 N.M.—[State v. Herrera](#), 92 N.M. 7, 1978-NMCA-048, 582 P.2d 384 (Ct. App. 1978).

18 U.S.—[Hogan & Hartson v. Butowsky](#), 459 F. Supp. 796 (S.D. N.Y. 1978).

Ala.—[Ex parte Tarpley](#), 293 Ala. 137, 300 So. 2d 409 (1974).

- 19 U.S.—*U. S. ex rel. Means v. Solem*, 457 F. Supp. 1256 (D.S.D. 1978).
 N.M.—*State v. Coates*, 1967-NMSC-199, 78 N.M. 366, 431 P.2d 744 (1967).
 N.Y.—*People v. Monroe*, 82 Misc. 2d 850, 370 N.Y.S.2d 1007 (Sup 1975).
- 20 Del.—*State v. Moyer*, 387 A.2d 194 (Del. 1978).
Violation clear in nature
 Trial judges should proceed with restraint in considering whether a due process violation has occurred and should so find only if it is unequivocally clear in nature and can be ascertained with certainty.
 Ill.—*People v. Schroeder*, 102 Ill. App. 3d 133, 57 Ill. Dec. 675, 429 N.E.2d 573 (2d Dist. 1981).
- 21 U.S.—*U. S. ex rel. Smith v. Baldi*, 344 U.S. 561, 73 S. Ct. 391, 97 L. Ed. 549 (1953).
- 22 U.S.—*Frisbie v. Collins*, 342 U.S. 519, 72 S. Ct. 509, 96 L. Ed. 541 (1952).
 As to requiring one forcibly removed from another state without the formality of extradition to face criminal charges in the state to which he or she is returned as not constituting a denial of due process, see § 1619.
- Showing of bribery**
 A mere showing of bribery of foreign officials by American agents to obtain physical control and custody over a defendant in a foreign country is not sufficient to constitute a deprivation of due process of law mandating the dismissal of an indictment against him or her in the United States.
 U.S.—*U.S. v. Orsini*, 424 F. Supp. 229 (E.D. N.Y. 1976), *aff'd*, 559 F.2d 1206 (2d Cir. 1977).
- 23 U.S.—*Estes v. State of Tex.*, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965).
 Pa.—*Com. v. Pierce*, 451 Pa. 190, 303 A.2d 209 (1973).
- 24 U.S.—*Estes v. State of Tex.*, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965); *Curry v. Secretary of Army*, 595 F.2d 873 (D.C. Cir. 1979).
 Pa.—*Com. v. Pierce*, 451 Pa. 190, 303 A.2d 209 (1973).
- 25 U.S.—*U. S. ex rel. Payton v. Rundle*, 472 F.2d 36 (3d Cir. 1972).
- 26 U.S.—*U. S. ex rel. Payton v. Rundle*, 472 F.2d 36 (3d Cir. 1972).
- 27 Neb.—*State v. Shambley*, 281 Neb. 317, 795 N.W.2d 884, 78 A.L.R.6th 655 (2011).
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Due Process Afforded in Drug Court Proceeding, 78 A.L.R.6th 1.
- 28 N.J.—*State v. Wilson*, 183 N.J. Super. 86, 443 A.2d 252 (Law Div. 1981).
- 29 N.J.—*State v. Lebbing*, 158 N.J. Super. 209, 385 A.2d 938 (Law Div. 1978).
- 30 Or.—*State v. Graves*, 58 Or. App. 286, 648 P.2d 866 (1982).
- 31 Or.—*State v. Graves*, 58 Or. App. 286, 648 P.2d 866 (1982).
Absence of drug court
 The defendants failed to establish that their right to due process was violated by the absence of a drug court in the county where they were charged with drug violations; the permissive nature of the drug court statute did not require each county to establish a drug court, and the decision not to establish a program where such a program was not required could not be considered arbitrary and capricious.
 Wash.—*State v. Harner*, 153 Wash. 2d 228, 103 P.3d 738 (2004), as amended on denial of reconsideration, (Feb. 17, 2005).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions


XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

A. In General

§ 1611. Limits on state action; particular forms of procedure

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West's Key Number Digest, [Constitutional Law](#)  [4491](#), [4500](#), [4501](#), [4510](#), [4511](#), [4514](#) to [4516](#), [4520](#), [4525](#), [4526](#), [4527\(1\)](#), [4555](#) to [4558](#), [4561](#), [4564](#), [4565](#), [4567](#), [4591](#), [4599](#), [4600](#), [4739](#), [4835](#), [4839](#), [4841](#)

In determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment, the question is whether the right is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, whether it is basic in our system of jurisprudence, and whether it is a fundamental right, essential to a fair trial.

In determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment, the question is whether the right is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, whether it is basic in our system of jurisprudence, and whether it is a fundamental right, essential to a fair trial.¹ While the freedom of the state and federal governments to control and regulate the procedure of their courts for the prosecution of criminal offenses is limited by the requirement of due process of law, and the procedure must not work a denial of the fundamental rights of an accused included within the conception of due process,² no particular form or method of procedure in criminal cases is required by the guaranty of due process, so long as an accused has due and sufficient notice of the charge or accusation and an adequate opportunity to be heard in defense.³

The Due Process Clause of the Fourteenth Amendment recognizes that differences arise naturally between the procedures in state courts and those in federal courts and leaves room for much of the freedom which has been originally reserved to the states for their exercise of their own police powers and for their control over the procedure to be followed in criminal trials in their respective courts.⁴ Thus, a state rule of law does not run afoul of the Fourteenth Amendment because another method may seem to be fairer or wiser or to give a surer promise of protection to an accused.⁵

Due process of law is not to be turned into a destructive dogma against the states in the administration of their system of criminal justice.⁶ Furthermore, the procedure followed by the states should not be found to violate the requirement of due process unless it violates the very essence of a scheme of ordered liberty and unless to continue it would violate a principle of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental.⁷

Accordingly, the Due Process Clause permits the states a wide latitude in fashioning their own rules of criminal procedure.⁸ The clause does not require that criminal procedure be uniform throughout the states, but each state can choose the methods and practices by which a crime is brought to book so long as the ultimate dignities of man assured by the Federal Constitution are observed.⁹

CUMULATIVE SUPPLEMENT

Cases:

The due process standard from *Medina v. California*, 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353, requiring a court to ask whether a defendant was exposed to a procedure offensive to a fundamental principle of justice, provides the appropriate framework for assessing the validity of state procedural rules that are part of the criminal process, which concern, for example, the allocation of burdens of proof and the type of evidence qualifying as admissible. U.S.C.A. Const.Amend. 14. *Nelson v. Colorado*, 137 S. Ct. 1249 (2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Duncan v. State of La.*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).
States free to provide greater protection, but not less
The Due Process Clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of the civil and political institutions, which not infrequently are designated as the law of the land; states are free to provide greater protections in their criminal justice system than the Federal Constitution requires but not less.
U.S.—*Desai v. Booker*, 882 F. Supp. 2d 926 (E.D. Mich. 2012).
- 2 U.S.—*Brown v. State of Mississippi*, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936).
Ala.—*Nelson v. State*, 50 Ala. App. 285, 278 So. 2d 734 (Crim. App. 1973).
Me.—*State v. Beal*, 446 A.2d 405, 31 A.L.R.4th 493 (Me. 1982).
- 3 U.S.—*Vines v. Muncy*, 553 F.2d 342 (4th Cir. 1977).
Me.—*Green v. State*, 247 A.2d 117 (Me. 1968).
Analysis
Procedural due process deals with the specific procedures that are employed in a statute and requires an analysis of whether a criminal defendant is given a meaningful opportunity to be heard.
Ill.—*People v. Jackson*, 2012 IL App (1st) 100398, 358 Ill. Dec. 552, 965 N.E.2d 623 (App. Ct. 1st Dist. 2012).

- 4 U.S.—[Bute v. People of State of Ill.](#), 333 U.S. 640, 68 S. Ct. 763, 92 L. Ed. 986 (1948).
Federal statutes not applicable to states
The Fourteenth Amendment does not make federal criminal procedure statutes applicable to state trials on any theory that without the same or their equivalent in state statutes there is a denial of due process of law. Ohio—[State v. Senzarino](#), 10 Ohio Misc. 241, 39 Ohio Op. 2d 383, 224 N.E.2d 389 (C.P. 1967).
Gap between minimum standards
There may be a wide gap between the minimum standards of fundamental fairness required by the Federal Constitution and standards consistent with an enlightened administration of justice for which each state through its courts is independently responsible in the exercise of its residual sovereignty.
Cal.—[People v. Coleman](#), 13 Cal. 3d 867, 120 Cal. Rptr. 384, 533 P.2d 1024 (1975).
5 U.S.—[Spencer v. State of Tex.](#), 385 U.S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967).
6 U.S.—[Rochin v. California](#), 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952).
Mich.—[People v. Coates](#), 337 Mich. 56, 59 N.W.2d 83 (1953).
7 U.S.—[Patterson v. New York](#), 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977); [U.S. v. Polouizzi](#), 697 F. Supp. 2d 381 (E.D. N.Y. 2010).
Ill.—[People v. Smith](#), 71 Ill. 2d 95, 15 Ill. Dec. 864, 374 N.E.2d 472 (1978).
Miss.—[Means v. State](#), 43 So. 3d 438 (Miss. 2010).
Substantial equality and fair procedure
A state's enforcement of its criminal laws must comply with the principles of substantial equality and fair procedure that are embodied in the Fourteenth Amendment.
U.S.—[McCoy v. Court of Appeals of Wisconsin](#), Dist. 1, 486 U.S. 429, 108 S. Ct. 1895, 100 L. Ed. 2d 440 (1988).
8 U.S.—[Bassett v. Smith](#), 464 F.2d 347 (5th Cir. 1972).
9 U.S.—[Carter v. People of State of Illinois](#), 329 U.S. 173, 67 S. Ct. 216, 91 L. Ed. 172 (1946).
Separate federal analysis not necessary
Because the due process requirements of the state constitution provide at least as much protection to criminal defendants as does the Fourteenth Amendment of the United States Constitution, a court need not undertake a separate federal analysis of due process claims.
N.H.—[State v. Hoag](#), 145 N.H. 47, 749 A.2d 331 (2000).
Minimum protection
As long as the state affords defendants the minimum protection required by the federal interpretation of the Fourteenth Amendment, a state court may interpret its state constitution to afford greater protection for defendants.
Colo.—[People v. Dunaway](#), 88 P.3d 619 (Colo. 2004).
Haw.—[State v. Texeira](#), 50 Haw. 138, 433 P.2d 593 (1967).
Variations in procedures
The test of Fourteenth Amendment due process is one of reviewing the substantive effect of a state's implementation of various civil rights, and variations in procedure will not constitute a violation of the Constitution as applied to the several states.
Vt.—[In re Davis](#), 126 Vt. 142, 224 A.2d 905 (1966).

16C C.J.S. Constitutional Law § 1612

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

A. In General

§ 1612. Constitutional rights regarding prosecutorial discrimination or misconduct

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4520, 4522 to 4527(2), 4555, 4625

Substantial discretion traditionally accorded a prosecutor in bringing a defendant to trial on criminal charges is subject to the Due Process Clause, which is a shield against unfair or deceptive treatment of the accused by the government.

Substantial discretion traditionally accorded a prosecutor in bringing a defendant to trial on criminal charges is subject to the Due Process Clause,¹ which is a shield against unfair or deceptive treatment of the accused by the government.² Under the Due Process Clause, a defendant enjoys protection against discriminatory prosecution³ and governmental misconduct⁴ since the government may act in such a discriminatory fashion in its enforcement of the laws as to constitute a denial of due process.⁵ Accordingly, due process principles can be invoked to bar the prosecution where it results from illegal law enforcement practices.⁶ Whether prosecutorial misconduct has caused or contributed to a due process violation may only be resolved in the context of the entire trial.⁷

The conscious exercise of some selectivity in enforcement is not in itself a violation of due process⁸ though there is a violation of the Equal Protection Clause where selection is based on an unjustifiable standard such as race, religion, or other arbitrary classification.⁹ Where the prosecution has a choice of charging the defendant for the same offense under two statutes, one imposing a greater penalty than the other, the decision to charge under the statute which imposes a greater penalty is a

proper exercise of prosecutorial discretion which does not violate the defendant's rights to due process of law.¹⁰ The exercise of prosecutorial discretion, even when it results in different treatment of codefendants originally charged in the same case with the same offense, is not violative of due process.¹¹ However, a due process violation results when a prosecutor pursues fundamentally inconsistent theories in separate trials against separate defendants charged with the same murder and knowingly uses false evidence or acts in bad faith.¹²

While it has been stated that the absence of good faith is an essential ingredient of prosecutorial misconduct,¹³ there is authority to the effect that for the purposes of due process, no distinction may be drawn as to whether the prosecutor acted in good faith¹⁴ and that the paramount importance in considering the alleged deprivation of a federally protected right under the Due Process Clause is not the good faith or bad faith of the prosecutor but whether or not the complainant receives a fair trial.¹⁵

Government intrusion into attorney-client relationship.

To elevate a violation of the attorney-client privilege to a claim of outrageous misconduct under the Due Process Clause, a defendant must demonstrate the government's objective awareness of an ongoing, personal attorney-client relationship between its informant and the defendant, deliberate intrusion into that relationship, and actual and substantial prejudice.¹⁶

CUMULATIVE SUPPLEMENT

Cases:

Deliberate preindictment intrusions into the attorney-client relationship may prove so pervasive and prejudicial as to imperil the fairness of subsequent proceedings, resulting in a due process violation under the Fifth Amendment. [U.S. Const. Amend. 5. Gaetano v. United States, 942 F.3d 727 \(6th Cir. 2019\).](#)

Due process protects against prosecutorial retaliation for a defendant's exercise of a statutory or constitutional right. [U.S. Const. Amend. 5. United States v. Young, 847 F.3d 328 \(6th Cir. 2017\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Miracle v. Estelle, 592 F.2d 1269 \(5th Cir. 1979\).](#)
Mass.—[Com. v. Gonzales, 5 Mass. App. Ct. 705, 369 N.E.2d 1038 \(1977\).](#)
Two-step process
In analyzing claims of prosecutorial misconduct, a court engages in a two-step analytical process, and these two steps are separate and distinct: (1) whether misconduct occurred in the first instance; and (2) whether that misconduct deprived a defendant of his or her due process right to a fair trial.
Conn.—[State v. Sinvil, 270 Conn. 516, 853 A.2d 105 \(2004\).](#)
Court disagreement with prosecutor's judgment
The Due Process Clause does not permit a court to abort a criminal prosecution simply because it disagrees with a prosecutor's judgment.
Wash.—[State v. Moen, 150 Wash. 2d 221, 76 P.3d 721 \(2003\).](#)
A.L.R. Library
[Limitations on state prosecuting attorney's discretion to initiate prosecution by indictment or by information, 44 A.L.R.4th 401.](#)

- 2 U.S.—[U.S. v. Romano](#), 583 F.2d 1 (1st Cir. 1978).
Right to be free from abusive use of government power
The Due Process Clause of the Fourteenth Amendment includes a substantive right to be free from abusive use of government power without any legitimate law enforcement objective.
La.—[Williams v. Dohm](#), 153 So. 3d 542 (La. Ct. App. 1st Cir. 2014).
Prohibited conduct; affirmative duties
The Due Process Clause prohibits conduct and imposes affirmative duties in criminal prosecutions: (1) the government may not knowingly present false evidence, (2) the government must correct false evidence that it did not solicit, and (3) the government must not suppress material evidence.
U.S.—[Honken v. U.S.](#), 42 F. Supp. 3d 937 (N.D. Iowa 2013).
Duty of disclosure
A breach of a prosecutor's duty of disclosure, in appropriate circumstances, violates a defendant's due process rights.
N.J.—[State v. Nash](#), 212 N.J. 518, 58 A.3d 705 (2013).
Lack of probable cause; improper purpose
A prosecution initiated without probable cause or conducted for an improper purpose may deprive a victim of procedural due process.
U.S.—[Weisman v. Sherry](#), 514 F. Supp. 728 (M.D. Pa. 1981).
- 3 U.S.—[Florida Businessmen for Free Enterprise v. City of Hollywood](#), 673 F.2d 1213 (11th Cir. 1982).
- 4 U.S.—[U.S. v. Baca](#), 687 F.2d 1356, 11 Fed. R. Evid. Serv. 885 (10th Cir. 1982).
"Arms" of government
When considering whether the State has deprived a person of due process in a criminal trial, there is no suggestion that different "arms" of the government are severable entities, particularly when they are closely connected; therefore, a city's police department represents the State no less than a prosecutor's office, and the taint on the trial is not less if the police, rather than the State's attorney, are guilty of misrepresentations.
Ohio—[State v. DeFronzo](#), 59 Ohio Misc. 113, 13 Ohio Op. 3d 337, 394 N.E.2d 1027 (C.P. 1978).
- 5 U.S.—[U.S. v. Gebhart](#), 441 F.2d 1261 (6th Cir. 1971).
- 6 Cal.—[People v. Johnson](#), 62 Cal. App. 3d Supp. 1, 133 Cal. Rptr. 123 (App. Dep't Super. Ct. 1976).
N.M.—[Benally v. Marcum](#), 89 N.M. 463, 553 P.2d 1270 (1976).
N.Y.—[People v. Rao](#), 73 A.D.2d 88, 425 N.Y.S.2d 122 (2d Dep't 1980).
Misconduct must be outrageous
Governmental misconduct must somehow impact the defendant's own rights before it rises to the level of outrageousness that will justify dismissing a prosecution; such conduct must be so outrageous that it violates the concept of fundamental fairness inherent in due process and shocks the sense of universal justice mandated by the Due Process Clause.
Wash.—[Dodge City Saloon, Inc. v. Washington State Liquor Control Bd.](#), 168 Wash. App. 388, 288 P.3d 343 (Div. 2 2012).
A.L.R. Library
[Failure of State Prosecutor to Disclose Pretrial Statement Made by Crime Victim as Violating Due Process](#), 102 A.L.R.5th 327.
[Failure of State Prosecutor to Disclose Exculpatory Medical Reports and Tests as Violating Due Process](#), 101 A.L.R.5th 187.
- 7 Conn.—[State v. Sinvil](#), 270 Conn. 516, 853 A.2d 105 (2004).
- 8 U.S.—[Martin v. Parratt](#), 549 F.2d 50 (8th Cir. 1977).
N.C.—[State v. Rudolph](#), 39 N.C. App. 293, 250 S.E.2d 318 (1979).
- 9 § 1317.
- 10 U.S.—[Robinson v. Berman](#), 594 F.2d 1 (1st Cir. 1979).
Alaska—[Holden v. State](#), 602 P.2d 452 (Alaska 1979).
Mich.—[People v. Bolton](#), 112 Mich. App. 626, 317 N.W.2d 199 (1981).
Under federal or District of Columbia statute
It is not a denial of due process for the government to choose to prosecute under a federal statute which imposes greater penalties for the same offense than the identical District of Columbia statute and vice versa.
U.S.—[U.S. v. Shepard](#), 515 F.2d 1324 (D.C. Cir. 1975).
D.C.—[Davis v. U. S.](#), 385 A.2d 757 (D.C. 1978).

- 11 U.S.—U.S. v. Dalton, 465 F.2d 32 (5th Cir. 1972); Newman v. U.S., 382 F.2d 479 (D.C. Cir. 1967).
12 Mass.—Com. v. Keo, 467 Mass. 25, 3 N.E.3d 55 (2014).
13 Cal.—People v. Morgan, 87 Cal. App. 3d 59, 150 Cal. Rptr. 712 (2d Dist. 1978) (disapproved of on other grounds by, People v. Kimble, 44 Cal. 3d 480, 244 Cal. Rptr. 148, 749 P.2d 803 (1988)).
Misconduct must be so outrageous as to shock the conscience
U.S.—U.S. v. SDI Future Health, Inc., 464 F. Supp. 2d 1027 (D. Nev. 2006).
Mont.—State v. Ugalde, 2013 MT 308, 372 Mont. 234, 311 P.3d 772 (2013).
14 Ohio—State v. DeFronzo, 59 Ohio Misc. 113, 13 Ohio Op. 3d 337, 394 N.E.2d 1027 (C.P. 1978).
15 U.S.—Urdiales v. Canales, 475 F. Supp. 622 (S.D. Tex. 1979).
Ky.—Matthews v. Com., 168 S.W.3d 14 (Ky. 2005).
Touchstone is fairness of trial, not culpability of prosecutor
Conn.—State v. Luster, 279 Conn. 414, 902 A.2d 636 (2006).
Pa.—Com. v. Elliott, 622 Pa. 236, 80 A.3d 415 (2013), cert. denied, 135 S. Ct. 50, 190 L. Ed. 2d 54 (2014).
16 U.S.—U.S. v. Hoffecker, 530 F.3d 137 (3d Cir. 2008); U.S. v. Thompson, 518 F.3d 832 (10th Cir. 2008).

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16C C.J.S. Constitutional Law § 1613

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

A. In General

§ 1613. Constitutional rights regarding prosecutorial discrimination or misconduct—Vindictiveness

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4520, 4522 to 4527(2), 4555, 4625

The standard for determining prosecutorial vindictiveness, which can be an affront to due process, is whether there is a realistic likelihood of vindictiveness for the prosecutor's augmentation of charges.

Prosecutorial vindictiveness can be an affront to due process.¹ Government efforts to prosecute a defendant for related offenses in successive trials is not fundamentally unfair amounting to impermissible harassment violative of due process;² however, successive prosecutions for crimes arising out of the same transaction may constitute harassment in violation of due process.³ In addition, successive state and federal prosecutions based on the same acts are not in violation of the Due Process Clause⁴ though a subsequent reprosecution of a charge dismissed as a result of a plea bargain is barred by elementary due process, irrespective of the language used by the court in dismissing those charges.⁵

The standard for determining prosecutorial vindictiveness, as bearing on the due process rights of a defendant, is whether there is a realistic likelihood of vindictiveness for the prosecutor's augmentation of charges.⁶ This is not to say, however, that in all cases where the prosecutor charges in the second trial a lesser offense than he or she has charged in the first, that there is per se no prosecutorial vindictiveness and no violation of due process.⁷ Defendant's due process rights are violated if there is actual

vindictiveness, as opposed to the mere apprehension of vindictiveness,⁸ although it has also been held that to find a due process violation based on prosecutorial vindictiveness, a court need not conclude that the prosecutor actually acted vindictively, it being sufficient if the prosecutor's actions raise the apprehension of a vindictive motive.⁹ The presence of subjective, "vindictive" motivation, as that term is normally understood, by the prosecutor is not dispositive or even necessarily relevant to the question of whether the prosecution has acted "vindictively" in the constitutional sense of that term.¹⁰

The presumption of an improper vindictive motive has been applied where a reasonable likelihood of vindictiveness exists.¹¹ It has been found, however, that a presumption of prosecutorial vindictiveness is not warranted in a case in which a defendant is indicted and convicted of a felony charge arising from the same incident as previously pending misdemeanor charges after the defendant decides not to plead guilty and requests a trial by jury on the misdemeanor charges where there is no actual evidence of vindictiveness and, in the absence of such a presumption of vindictiveness, no due process violation is established.¹²

To punish a person because he or she has done what the law plainly allows him or her to do is a due process violation of the most basic sort.¹³ Accordingly, a defendant's right to due process of law is violated where the prosecution increases the severity of the alleged charges in response to the exercise of a constitutional or statutory right.¹⁴

In the give-and-take of plea bargaining, however, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.¹⁵ Accordingly, the Due Process Clause does not prohibit a prosecutor from carrying out a threat, made during plea negotiations, to bring additional charges against an accused who refuses to plead guilty to the offense with which he or she is originally charged,¹⁶ since the course of conduct engaged in by the prosecutor, which no more than openly presents a defendant with the unpleasant alternatives of forgoing trial or facing charges on which he or she is plainly subject to prosecution, does not violate the Due Process Clause.¹⁷

The Due Process Clause does not prevent the prosecutor from putting pressure on the defendant to cooperate by promising him or her that he or she will be prosecuted under a statute providing lesser penalties.¹⁸ In various other instances, it has been found that due process is not violated on the ground of prosecutorial vindictiveness.¹⁹

CUMULATIVE SUPPLEMENT

Cases:

Defendant's re-indictment for first-degree murder, after he successfully challenged his previous indictment for manslaughter, attempted manslaughter and weapons charges, did not constitute vindictive prosecution violative of Fifth Amendment's Due Process Clause; although grant of mandamus, followed by sharply worded criticism in denying reconsideration in which Court of Appeals chastised government for failing to timely reindict defendant, supported finding of presumption of vindictiveness, government rebutted presumption, as the grant of mandamus left government with no alternative but to charge defendant with murder or else a "heinous crime" would go unpublished, and defendant offered no evidence to support finding of actual vindictiveness. *U.S. Const. Amend. 5. United States v. Slatten*, 865 F.3d 767 (D.C. Cir. 2017).

[END OF SUPPLEMENT]

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Footnotes

1 U.S.—*U.S. v. Segal*, 495 F.3d 826 (7th Cir. 2007); *Baker v. Barrett*, 16 F. Supp. 3d 815 (E.D. Mich. 2014).

Ind.—*Sisson v. State*, 985 N.E.2d 1 (Ind. Ct. App. 2012), transfer denied, 982 N.E.2d 1017 (Ind. 2013).

Wis.—*State v. Johnson*, 2000 WI 12, 232 Wis. 2d 679, 605 N.W.2d 846 (2000).

Conflict of interests

Advancement of a prosecutorial vindictiveness claim brings into conflict two antithetical interests: the due process right of the defendant to be free of apprehension that the State might subject him or her to increased potential punishment if he or she exercises his or her right to make a direct or collateral attack on his or her conviction, and the prosecutor's broad discretion to control the decision to prosecute; because of the societal importance of both policies, the actual showing the accused must make to establish a due process violation depends on a careful balancing of such interests.

U.S.—*Miracle v. Estelle*, 592 F.2d 1269 (5th Cir. 1979).

U.S.—*U.S. v. Chases*, 558 F.2d 912 (9th Cir. 1977).

U.S.—*U.S. v. American Honda Motor Co.*, 271 F. Supp. 979 (N.D. Cal. 1967).

Mich.—*People v. Walls*, 117 Mich. App. 691, 324 N.W.2d 136 (1982).

As to double jeopardy as a violation of due process, see § 1620.

U.S.—*Bartkus v. People of State of Ill.*, 359 U.S. 121, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1959); *U.S. v. Kerley*, 643 F.2d 299 (5th Cir. 1981).

Wis.—*Nelson v. State*, 53 Wis. 2d 769, 193 N.W.2d 704 (1972).

U.S.—*Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

Kan.—*Cox v. State*, 2 Kan. App. 2d 121, 575 P.2d 905 (1978).

Wis.—*State v. Johnson*, 2000 WI 12, 232 Wis. 2d 679, 605 N.W.2d 846 (2000).

U.S.—*Miracle v. Estelle*, 592 F.2d 1269 (5th Cir. 1979).

U.S.—*U.S. v. Thomas*, 593 F.2d 615 (5th Cir. 1979), on reh'g, 604 F.2d 450 (5th Cir. 1979).

Regardless of presumption

Regardless of whether the presumption of vindictiveness applies, a prosecutor's actual vindictiveness will always result in a due process violation.

U.S.—*U.S. v. Berberena*, 640 F. Supp. 2d 629 (E.D. Pa. 2009).

La.—*Sisson v. State*, 985 N.E.2d 1 (Ind. Ct. App. 2012), transfer denied, 982 N.E.2d 1017 (Ind. 2013).

U.S.—*U.S. v. Walker*, 514 F. Supp. 294, 60 A.L.R. Fed. 734 (E.D. La. 1981).

U.S.—*Thigpen v. Roberts*, 468 U.S. 27, 104 S. Ct. 2916, 82 L. Ed. 2d 23 (1984).

Presumption exists only in very narrow set of circumstances

Presumptions of vindictiveness, in violation of due process, exist only in a very narrow set of circumstances, and ordinarily, a presumption of prosecutorial vindictiveness exists where a prosecutor brings additional charges and more serious charges against a defendant after the defendant has successfully overturned a conviction, effectively subjecting the defendant to greater sanctions for pursuing a statutory or constitutional right.

Ill.—*People v. Rendak*, 2011 IL App (1st) 82093, 354 Ill. Dec. 227, 957 N.E.2d 543 (App. Ct. 1st Dist. 2011).

New charges filed after successful exercise of defendant's right to appeal

A presumption of vindictiveness, in violation of due process, arises when the prosecution files additional charges after the accused has successfully exercised his or her right to an appeal; the underlying reasoning is if defendants faced the threat of more serious charges after a successful appeal, they might be less likely to exercise their right to appeal.

Ind.—*Schiro v. State*, 888 N.E.2d 828 (Ind. Ct. App. 2008).

No presumption in pretrial setting

In the pretrial setting, there is no presumption of vindictiveness under the Due Process Clause when the prosecution increases the charges or the potential penalty; rather, the defendant must prove objectively that the prosecutor's charging decision was motivated by a desire to punish him or her for doing something the law plainly allowed him or her to do.

Cal.—*People v. Grimes*, 182 Cal. Rptr. 3d 50, 340 P.3d 293 (Cal. 2015).

U.S.—*U. S. v. Goodwin*, 457 U.S. 368, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982).

U.S.—*U. S. v. Goodwin*, 457 U.S. 368, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982); *U.S. v. Barner*, 572 F.3d 1239 (11th Cir. 2009).

Ariz.—*State v. Mieg*, 225 Ariz. 445, 239 P.3d 1258 (Ct. App. Div. 1 2010).

D.C.—*Thorne v. U.S.*, 46 A.3d 1085 (D.C. 2012).

Ill.—*People v. Kun Lee*, 2011 IL App (2d) 100205, 352 Ill. Dec. 478, 954 N.E.2d 338 (App. Ct. 2d Dist. 2011).

Mont.—*State v. Roundstone*, 2011 MT 227, 362 Mont. 74, 261 P.3d 1009 (2011).

Enhanced sentences or charges

Due process does not in any sense forbid enhanced sentences or charges but only enhancement motivated by actual vindictiveness toward a defendant for having exercised guaranteed rights.

U.S.—*U.S. v. Kent*, 649 F.3d 906 (9th Cir. 2011).

Retaliation for exercise of rights

A decision to prosecute violates due process when the prosecution is brought in retaliation for the defendant's exercise of legal rights.

U.S.—*United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68 (D.D.C. 2011); *U.S. v. Santiago-Rodriguez*, 990 F. Supp. 2d 129 (D.P.R. 2013).

S.C.—*State v. Higgenbottom*, 344 S.C. 11, 542 S.E.2d 718 (2001).

Tex.—*Neal v. State*, 150 S.W.3d 169 (Tex. Crim. App. 2004).

14 U.S.—*U.S. v. Jenkins*, 537 F.3d 1 (1st Cir. 2008), redesignated as opinion and publication ordered, (July 31, 2008); *U.S. v. LaDeau*, 734 F.3d 561 (6th Cir. 2013); *U.S. v. Kent*, 649 F.3d 906 (9th Cir. 2011).

Ariz.—*State v. Mieg*, 225 Ariz. 445, 239 P.3d 1258 (Ct. App. Div. 1 2010).

Cal.—*People v. Jurado*, 38 Cal. 4th 72, 41 Cal. Rptr. 3d 319, 131 P.3d 400 (2006).

S.C.—*State v. Blakely*, 402 S.C. 650, 742 S.E.2d 29 (Ct. App. 2013).

Exercise of right to appeal

U.S.—*Jordan v. Epps*, 756 F.3d 395 (5th Cir. 2014); *U.S. v. Chappell*, 779 F.3d 872 (8th Cir. 2015).

Superseding indictment

A superseding indictment adding new charges that increase the potential penalty would violate due process if the prosecutor obtained the new charges out of vindictiveness; in such context, "vindictiveness" means the desire to punish a person for exercising his or her rights.

U.S.—*U.S. v. Barner*, 441 F.3d 1310 (11th Cir. 2006).

Prima facie violation

A defendant established a prima facie due process violation with regard to prosecutorial vindictiveness in that, after he successfully appealed his conviction, the State filed an amended felony information that subjected him to a higher sentence than he had received at the previous trial, in a prosecution for aggravated robbery.

Ark.—*Townsend v. State*, 355 Ark. 248, 134 S.W.3d 545 (2003).

Causal connection

(1) A defendant asserting a claim of vindictive prosecution in violation of the Due Process Clause of the Fourteenth Amendment must convince the court he or she would not have been prosecuted but for the government's animus; if the defendant is able to make this evidentiary showing, then the burden shifts to the government, which must prove the motivation behind the prosecutorial decision was proper.

U.S.—*U.S. v. Pittman*, 642 F.3d 583 (7th Cir. 2011).

(2) "Retaliation" barred by the Due Process Clause does not exist where the government exercises its charging discretion simply "because of" defendant's exercise of his or her rights, but instead exists only where the government would not have exercised its charging authority "but for" defendant's exercise of his or her rights.

U.S.—*U.S. v. Walker*, 514 F. Supp. 294, 60 A.L.R. Fed. 734 (E.D. La. 1981).

15 U.S.—*Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978); *U.S. v. Walker*, 514 F. Supp. 294, 60 A.L.R. Fed. 734 (E.D. La. 1981).

16 U.S.—*Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

Wis.—*State v. Johnson*, 2000 WI 12, 232 Wis. 2d 679, 605 N.W.2d 846 (2000).

17 U.S.—*Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

Iowa—*State v. Longbine*, 263 N.W.2d 527 (Iowa 1978).

Wis.—*State v. Johnson*, 2000 WI 12, 232 Wis. 2d 679, 605 N.W.2d 846 (2000).

18 U.S.—*Miller v. Superintendent, Otisville Correctional Facility*, 480 F. Supp. 858 (S.D. N.Y. 1979).

19 U.S.—*U.S. v. Mauricio*, 685 F.2d 143 (5th Cir. 1982).

D.C.—*Washington v. U. S.*, 434 A.2d 394 (D.C. 1980).

[Va.—Barrett v. Com., 268 Va. 170, 597 S.E.2d 104 \(2004\).](#)

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16C C.J.S. Constitutional Law § 1614

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

A. In General

§ 1614. Constitutional rights regarding prosecutorial discrimination or misconduct—Entrapment or outrageous government conduct

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4520, 4522 to 4527(2), 4555, 4625

Entrapment does not ordinarily violate fundamental principles of due process, but due process may be violated where the government involvement in a criminal enterprise has become so outrageous as to violate fundamental fairness or is shocking to the universal sense of justice.

The defense of entrapment is not one of constitutional dimension under the Federal Constitution,¹ and entrapment does not ordinarily violate fundamental principles of due process.² However, under the close relative of the entrapment defense, which may be referred to as the outrageous government involvement or conduct defense,³ due process may be violated where the government involvement in a criminal enterprise has become so outrageous as to violate fundamental fairness, or is shocking to the universal sense of justice.⁴

In various instances, it has been found that the government involvement in the criminal enterprise has been so outrageous as to violate the fundamental fairness and the universal sense of justice mandated by the Due Process Clause⁵ while, in other cases, the government involvement has been found not so outrageous as to constitute the violation of due process.⁶

A faulty investigation by a state police officer which leads to the deprivation of a suspect's liberty only violates the Fourteenth Amendment's Due Process Clause where the suspect shows the officers intentionally or recklessly failed to investigate, thereby shocking the conscience.⁷ Negligence and even gross negligence in conducting a criminal investigation is not enough to establish a violation of the Fourteenth Amendment's Due Process Clause because the challenged action must be truly egregious and extraordinary to shock the conscience and so severe as to amount to brutal and inhumane abuse of official power.⁸ Criminal investigators shock the conscience, so as to support a claim for a substantive due process violation under the Fourteenth Amendment, when they attempt to coerce or threaten the criminal defendant, purposefully ignore evidence of the defendant's innocence, or systematically pressure to implicate the defendant despite contrary evidence.⁹

Government agents may employ appropriate artifice and deception in their investigations, make excessive offers, and even utilize threats or intimidation, if not exceeding permissible bounds, and such conduct does not constitute outrageous government conduct in violation of due process.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

A police officer who manufactures false evidence against a criminal defendant violates due process if that evidence is later used to deprive the defendant of his liberty in some way. [U.S. Const. Amend. 14](#). [Anderson v. City of Rockford](#), 932 F.3d 494 (7th Cir. 2019).

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Footnotes

- 1 U.S.—[U.S. v. Russell](#), 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973).
N.H.—[State v. Little](#), 121 N.H. 765, 435 A.2d 517 (1981).
Wash.—[State v. Walker](#), 11 Wash. App. 84, 521 P.2d 215 (Div. 1 1974).
Objective entrapment under state constitution
The due process entrapment defense is based on an objective theory of entrapment, and arises when conduct of the government is patently wrongful in that it constitutes an abuse of lawful power, perverts the proper role of government and offends principles of fundamental fairness.
N.J.—[State v. Davis](#), 390 N.J. Super. 573, 916 A.2d 493 (App. Div. 2007).
- 2 Ala.—[Tyson v. State](#), 361 So. 2d 1182 (Ala. Crim. App. 1978).
Conduct must shock conscience of court
With respect to a defendant's assertion of the affirmative defense of entrapment, the level of outrageous police conduct necessary to prove a due process violation is quite high and must shock the conscience of the court.
N.D.—[State v. Schmidt](#), 2011 ND 238, 807 N.W.2d 593 (N.D. 2011).
Statute precluding defense of entrapment
A statute precluding the defense of entrapment when the causing or threatening of physical injury is an element of the offense charged does not deny due process to a defendant charged with attempted murder and kidnapping.
Del.—[Saienni v. State](#), 346 A.2d 152 (Del. 1975).
- 3 U.S.—[U.S. v. Wylie](#), 625 F.2d 1371 (9th Cir. 1980).
Distinguished from entrapment
(1) The defense of "outrageous government conduct" is distinct from the entrapment defense in that it raises a question of law for the court, that is, a due process issue, and is available even to a defendant who was

"predisposed" to commit a crime and thus could not claim entrapment; however, the level of government misconduct that must be shown is perhaps higher than for entrapment.

U.S.—*U.S. v. Batres-Santolino*, 521 F. Supp. 744 (N.D. Cal. 1981).

(2) To raise a defense of entrapment requires an absence of predisposition on the part of the defendant to commit the crime; in contrast, an absence of predisposition is not required to assert a claim of outrageous conduct in violation of due process.

U.S.—*U.S. v. McLean*, 2015 WL 144077 (E.D. Pa. 2015).

4 U.S.—*U.S. v. Russell*, 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973); *U.S. v. Al Kassar*, 660 F.3d 108 (2d Cir. 2011); *U.S. v. Augustin*, 661 F.3d 1105, 86 Fed. R. Evid. Serv. 1275 (11th Cir. 2011).

N.H.—*State v. Little*, 121 N.H. 765, 435 A.2d 517 (1981).

Pa.—*Com. v. Sun Cha Chon*, 2009 PA Super 212, 983 A.2d 784 (2009).

Wash.—*State v. Jessup*, 31 Wash. App. 304, 641 P.2d 1185 (Div. 1 1982).

Predisposed defendant

The concept of fundamental fairness inherent in the due process requirement will prevent conviction of even a predisposed defendant if the conduct of the government in participating in or inducing the commission of the crime is sufficiently outrageous; but the challenged government conduct must reach a demonstrable level of outrageousness before it could bar conviction.

Minn.—*State v. Christenson*, 827 N.W.2d 436 (Minn. Ct. App. 2012), review denied, (Feb. 19, 2013).

Factors considered, generally

In determining whether police conduct is so egregious as to violate a defendant's due process rights, factors to be considered are: (1) whether the police manufactured a crime which otherwise would not likely have occurred, or merely involved themselves in an ongoing criminal activity; (2) whether the police themselves engaged in criminal or improper conduct repugnant to a sense of justice; (3) whether the defendant's reluctance to commit the crime is overcome by appeals to humanitarian instincts such as sympathy or past friendship, by temptation of exorbitant gain, or by persistent solicitation in the face of unwillingness; and (4) whether the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace.

N.Y.—*People v. Spence*, 39 A.D.3d 673, 833 N.Y.S.2d 599 (2d Dep't 2007).

5 U.S.—*U.S. v. Twigg*, 588 F.2d 373 (3d Cir. 1978).

N.Y.—*People v. Isaacson*, 44 N.Y.2d 511, 406 N.Y.S.2d 714, 378 N.E.2d 78 (1978).

6 U.S.—*Hampton v. U. S.*, 425 U.S. 484, 96 S. Ct. 1646, 48 L. Ed. 2d 113 (1976).

Del.—*Harrison v. State*, 442 A.2d 1377 (Del. 1982).

Vt.—*State v. Hayes*, 170 Vt. 618, 752 A.2d 16 (2000).

Using aliens as informants

The government's conduct in using aliens to act as informants for the Immigration and Naturalization Service in order to arrest transporters of illegal aliens and "paying" informants by giving them forms entitling them to remain temporarily in the United States was not so outrageous that due process principles required reversal of the defendant's conviction for transportation of illegal aliens.

U.S.—*U.S. v. Alvarado-Machado*, 867 F.2d 209 (5th Cir. 1989).

7 U.S.—*Hawkins v. Gage County, Neb.*, 759 F.3d 951 (8th Cir. 2014); *Eckman v. Lancaster City*, 742 F. Supp. 2d 638 (E.D. Pa. 2010), judgment aff'd, 515 Fed. Appx. 93 (3d Cir. 2013) and aff'd, 529 Fed. Appx. 185 (3d Cir. 2013).

8 U.S.—*Livers v. Schenck*, 700 F.3d 340 (8th Cir. 2012).

9 U.S.—*Folkerts v. City of Waverly, Iowa*, 707 F.3d 975 (8th Cir. 2013).

10 Ariz.—*State v. Williamson*, 236 Ariz. 550, 343 P.3d 1 (Ct. App. Div. 2 2015).

Manipulative, sneaky and deceitful investigative methods

(1) For purposes of a claim for a violation of Fifth Amendment due process rights based on outrageous government conduct, the government's use of manipulative, sneaky, and deceitful investigative methods does not, without more, rise to the level of a constitutional outrage.

U.S.—*U.S. v. Rich*, 2015 WL 452190 (E.D. N.Y. 2015).

(2) Police may generally engage in deception while investigating a crime, with suppression required only when the deception was so fundamentally unfair as to deny due process, or a promise or threat was made that could induce a false confession.

N.Y.—[People v. Colbert](#), 60 A.D.3d 1209, 875 N.Y.S.2d 339 (3d Dep't 2009).

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16C C.J.S. Constitutional Law § 1615

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

A. In General

§ 1615. Constitutional rights regarding the creation or definition of criminal offenses

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4503 to 4507, 4509(1) to 4509(25), 4515

Due process applies to legislation in criminal matters, and in order to constitute due process of law, a penal statute or ordinance must be a reasonable exercise of power possessed by the legislative body enacting it and must fix a standard of guilt with reasonable certainty.

Due process applies not only to court procedure but also to legislation, especially in criminal matters.¹ The statute under which a person is deprived of his or her liberty as punishment for a crime is a part of the process of law used against him or her,² and not only does due process require a law creating and defining the offense but it also requires that the statute defining the crime be valid and constitutional.³ The power of a state to determine that certain acts will constitute a crime and to fix the punishment therefor is limited by the constitutional guaranty of due process of law;⁴ however, such limitation, in the main, concerns not restrictions on the powers of the states to define crime, except in the restricted area where federal authority has preempted the field, but restrictions on the manner in which the states may enforce their penal codes.⁵

In order to satisfy the constitutional requirement of due process, a state or federal statute or municipal ordinance creating and defining an offense and fixing the punishment therefor must be a reasonable exercise of power possessed by the federal, state,

or municipal legislative body enacting it.⁶ It must not arbitrarily and unreasonably prescribe that certain acts inherently and generally innocent will constitute criminal offenses⁷ or make a classification which is purely arbitrary or unreasonable.⁸

It is an essential component of due process that individuals be given fair warning or notice of those acts which may lead to a loss of liberty.⁹ Accordingly, conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process,¹⁰ and such due process requirement of notice is essential where, from the mere failure to act, a person, wholly passive and unaware of any wrongdoing, faces criminal charges.¹¹

A statute or ordinance which fulfills the foregoing requirements does not violate due process¹² but one which fails to fulfill such requirements does so.¹³

Although the Due Process Clause bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope,¹⁴ it does not bar the government from filing charges against a defendant if his or her conduct is within the statute's scope even when the government has never filed such charges in past.¹⁵

Converting state misdemeanor into federal felony.

Converting an act which constitutes a misdemeanor under state law into a federal felony does not violate due process.¹⁶

Defenses.

Due process does not require a defendant to have at his or her disposal an absolute defense negating criminal responsibility.¹⁷ Thus, a state legislature is free to define a criminal offense and bar consideration of a particular defense so long as due process is not offended.¹⁸ The legislature may limit affirmative defenses to a particular category of crimes without offending due process;¹⁹ due process requires only that such limitation not impair the basic rights of the criminally accused.²⁰ Furthermore, due process does not mandate that when a state treats the absence of an affirmative defense as an element of the crime for one purpose, it must do so for all purposes.²¹ Thus, a statute negating the defense of impossibility has been found not violative of due process,²² and a statutory rape statute which denies the defense of mistake or misrepresentation as to the victim's age has been found not to deny due process.²³ Similarly, a statute prohibiting the use of minors in sexual performances which specifically precludes the defense of mistake as to age does not violate due process.²⁴

Double enhancement of crime.

Doubly enhancing the status of a crime in that one element is used twice to increase the severity of the charge is not inconsistent with due process.²⁵

Habitual offender statutes.

Due process does not prevent the states from enacting habitual offender statutes.²⁶

Vicarious liability.

It has been held that imposing criminal liability based only on a loose association with criminal activity offends due process²⁷ and that vicarious criminal liability violates due process.²⁸

It has been found that any attempt to impose vicarious liability on parents for the acts of their children, simply because they occupy the status of parents, without more, offends due process²⁹ but that a statute imposing vicarious liability on an employer for the acts of his or her employee is not violative of due process.³⁰

Accomplice liability.

When the State has initially advanced a theory of principal liability but not accomplice liability, it may nonetheless seek to convict the defendant as an accomplice without violating due process.³¹

CUMULATIVE SUPPLEMENT

Cases:

The primary guide in determining whether a state rule about criminal liability violates due process is historical practice, and in assessing that practice, the Supreme Court looks primarily to eminent common-law authorities, as well as to early English and American judicial decisions. [U.S. Const. Amend. 14](#). [Kahler v. Kansas](#), 140 S. Ct. 1021 (2020).

The Supreme Court traditionally exercises restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress and out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. [Marinello v. U.S.](#), 138 S. Ct. 1101 (2018).

The Due Process Clause of the Fifth Amendment prohibits the Government from taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. [U.S.C.A. Const. Amend. 5](#). [Beckles v. U.S.](#), 137 S. Ct. 886 (2017).

Defendant, who claimed that statutes prohibiting sexual penetration and sexual conduct where complainant is at least 13 but less than 16 years of age and the actor is more than 24 months older violated substantive due process by making the mistake-of-age defense available only to defendants no more than 120 months older than victim, failed to show that he was deprived of a fundamental right, and thus, substantive due process challenge to statutes was subject to rational basis test. [U.S. Const. Amend. 14](#), § 1; [Minn. Const. art. 1](#), § 7; [Minn. Stat. Ann. §§ 609.344\(1\)\(b\), 609.345\(1\)\(b\)](#). [State v. Holloway](#), 916 N.W.2d 338 (Minn. 2018).

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Footnotes

- 1 U.S.—[Williams v. U.S.](#), 179 F.2d 644 (5th Cir. 1950), judgment aff'd, 341 U.S. 70, 71 S. Ct. 581, 95 L. Ed. 758 (1951).
Ala.—[Walker v. State](#), 356 So. 2d 672 (Ala. 1977).
Kan.—[State v. Randol](#), 226 Kan. 347, 597 P.2d 672 (1979).
N.C.—[State v. Wall](#), 304 N.C. 609, 286 S.E.2d 68 (1982).
Legislative discretion limited by Due Process Clause

Although the Legislature has considerable discretion in defining crimes and the manner in which those crimes can be committed, the Due Process Clause of the United States Constitution and the state constitution's Due Course of Law provision limit this broad discretion.

Tex.—*Fulmer v. State*, 401 S.W.3d 305 (Tex. App. San Antonio 2013), cert. denied, 134 S. Ct. 436, 187 L. Ed. 2d 293 (2013).

U.S.—*U.S. v. Armstrong*, 265 F. 683 (D. Ind. 1920).

U.S.—*Winters v. New York*, 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840 (1948).

Cal.—*People v. Building Maintenance Contractors' Ass'n*, 41 Cal. 2d 719, 264 P.2d 31 (1953).

S.D.—*State v. Dove*, 75 S.D. 460, 67 N.W.2d 917 (1955).

Requirements decision

In deciding whether a criminal statute meets due process requirements, a court must consider not only the language of the statute itself but also the legislative objective and the evil the statute seeks to remedy.

Ill.—*People v. Lewis*, 73 Ill. App. 3d 361, 25 Ill. Dec. 436, 386 N.E.2d 910 (3d Dist. 1979).

U.S.—*Winters v. New York*, 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840 (1948).

Wis.—*State v. Radke*, 2003 WI 7, 259 Wis. 2d 13, 657 N.W.2d 66 (2003).

Fundamental principle

Due process generally is not implicated by policy decisions to include or exclude a particular element in defining unlawful conduct unless it can be said that the enactment offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

Colo.—*People ex rel. City of Arvada v. Nissen*, 650 P.2d 547 (Colo. 1982).

U.S.—*Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952).

Robbery statute

A statute defining robbery was not in violation of due process, even though it defined robbery to include conduct which was not robbery at common law or under prior statutes, because due process does not require the legislature to give crimes the same elements they had at common law or under prior statutes, and due process does not bar a crime from being called robbery merely because the perpetrator did not succeed, as it was not irrational for the legislature to make person as culpable for a bungled robbery as for a successful one.

Iowa.—*State v. Pierce*, 287 N.W.2d 570 (Iowa 1980).

U.S.—*Winters v. New York*, 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840 (1948).

Ill.—*People v. Wilson*, 214 Ill. 2d 394, 292 Ill. Dec. 887, 827 N.E.2d 416 (2005).

U.S.—*Winters v. New York*, 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840 (1948).

Ky.—*Com. v. O'Harrah*, 262 S.W.2d 385 (Ky. 1953).

Some limits on legislative power

Due process places some limits on legislative power to penalize innocent conduct.

Mass.—*Simon v. Solomon*, 385 Mass. 91, 431 N.E.2d 556 (1982).

U.S.—*Lewis v. U.S.*, 445 U.S. 55, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980).

Conn.—*State v. Simmat*, 184 Conn. 222, 439 A.2d 915 (1981).

Ill.—*People v. Wagner*, 89 Ill. 2d 308, 60 Ill. Dec. 470, 433 N.E.2d 267 (1982).

N.D.—*State v. Lind*, 322 N.W.2d 826 (N.D. 1982).

Relation to evil

Due process demands that a law be not unreasonable or arbitrary and that it be reasonably related and applied to some actual and manifest evil.

N.Y.—*People v. Vernon*, 83 Misc. 2d 1025, 373 N.Y.S.2d 314 (Sup 1975).

U.S.—*City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67, 72 A.L.R.5th 665 (1999); *Butler v. O'Brien*, 663 F.3d 514 (1st Cir. 2011); *U.S. v. Fontaine*, 57 V.I. 914, 697 F.3d 221 (3d Cir. 2012).

Ill.—*People v. Maness*, 191 Ill. 2d 478, 247 Ill. Dec. 490, 732 N.E.2d 545 (2000).

Minn.—*State v. Ornelas*, 675 N.W.2d 74 (Minn. 2004).

As to timely notice and opportunity to be heard as due process requirements, generally, see § 1610.

As to a warning as part of the due process requirement as to certainty and definiteness of a criminal statute, see § 1618.

Fundamental to concept of constitutional liberty

The due process principle that persons have a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to the concept of constitutional liberty.

Ind.—*Armstrong v. State*, 848 N.E.2d 1088 (Ind. 2006).

Overlapping statutes

Overlapping statutes which carry differing penalties do not violate due process so long as each statute gives fair notice of the essential elements of the offense and the penalty for its violation.

Ind.—[Comer v. State](#), 428 N.E.2d 48 (Ind. Ct. App. 1981).

Person of ordinary intelligence

(1) Due process notions of fundamental fairness require that criminal offenses be defined in terms sufficient to give a person of ordinary intelligence fair notice that the contemplated conduct is forbidden by the statute; the underlying principle for the requirement is that no person should be required at risk of his or her liberty to speculate as to the meaning of a criminal statute.

Ariz.—[State v. Limpus](#), 128 Ariz. 371, 625 P.2d 960 (Ct. App. Div. 1 1981).

(2) The Due Process Clause requires that the law give a person of ordinary intelligence fair warning that his or her specific contemplated conduct is forbidden.

Ga.—[Garza v. State](#), 284 Ga. 696, 670 S.E.2d 73 (2008).

10 U.S.—[Wright v. State of Ga.](#), 373 U.S. 284, 83 S. Ct. 1240, 10 L. Ed. 2d 349 (1963).

Cal.—[People v. Barksdale](#), 8 Cal. 3d 320, 105 Cal. Rptr. 1, 503 P.2d 257 (1972).

Iowa—[Knight v. Iowa Dist. Court of Story County](#), 269 N.W.2d 430 (Iowa 1978).

Ohio—[City of Columbus v. New](#), 1 Ohio St. 3d 221, 438 N.E.2d 1155 (1982).

Fair warning as first essential of due process

The first essential of due process is fair warning of the act which is made punishable as a crime.

Ariz.—[State v. Lockwood](#), 222 Ariz. 551, 218 P.3d 1008 (Ct. App. Div. 2 2009).

Clear, settled law of jurisdiction

Where the clear, settled law of the jurisdiction precludes one from having notice that conduct is criminal, due process does not permit a criminal conviction for that conduct.

U.S.—[U.S. v. Goodheim](#), 664 F.2d 754 (9th Cir. 1981).

11 U.S.—[Lambert v. People of the State of California](#), 355 U.S. 225, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957) (felon registration ordinance).

New requirement

Where an entirely new requirement is created under which a failure to act constitutes a crime, then due process may be violated if a defendant had no notice of any such requirement.

U.S.—[U.S. v. Johnson](#), 652 F. Supp. 2d 720 (S.D. Miss. 2009).

Strict liability statute

The due process bar to a strict-liability criminal statute applies when the underlying conduct is so passive, so unworthy of blame, that the persons violating the proscription would have no notice that they were breaking the law.

N.J.—[State v. Pomianek](#), 221 N.J. 66, 110 A.3d 841 (2015).

12 U.S.—[Lewis v. U.S.](#), 445 U.S. 55, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980).

Nev.—[Kuban v. McGimsey](#), 96 Nev. 105, 605 P.2d 623 (1980).

13 N.Y.—[People v. Onofre](#), 72 A.D.2d 268, 424 N.Y.S.2d 566 (4th Dep't 1980), order aff'd, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936, 20 A.L.R.4th 987 (1980).

Grandparent and grandchild

A housing ordinance limiting the occupancy of a dwelling unit to members of a single family and recognizing as a "family" only a few categories of related individuals, under which it was a crime for a grandmother to have her grandson living with her, violated due process.

U.S.—[Moore v. City of East Cleveland, Ohio](#), 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977).

14 U.S.—[U.S. v. MacKay](#), 715 F.3d 807 (10th Cir. 2013), cert. denied, 134 S. Ct. 1275, 188 L. Ed. 2d 297 (2014); [U.S. v. Saathoff](#), 708 F. Supp. 2d 1020 (S.D. Cal. 2010).

15 U.S.—[U.S. v. MacKay](#), 715 F.3d 807 (10th Cir. 2013), cert. denied, 134 S. Ct. 1275, 188 L. Ed. 2d 297 (2014).

16 U.S.—[U.S. v. Brennan](#), 394 F.2d 151 (2d Cir. 1968).

17 U.S.—[Haskell v. Berghuis](#), 695 F. Supp. 2d 574 (E.D. Mich. 2010), aff'd, 511 Fed. Appx. 538 (6th Cir. 2013), cert. denied, 134 S. Ct. 197, 187 L. Ed. 2d 45 (2013).

Mo.—[State v. Williams](#), 366 S.W.3d 609 (Mo. Ct. App. W.D. 2012).

18 U.S.—[Haskell v. Berghuis](#), 695 F. Supp. 2d 574 (E.D. Mich. 2010), aff'd, 511 Fed. Appx. 538 (6th Cir. 2013), cert. denied, 134 S. Ct. 197, 187 L. Ed. 2d 45 (2013).

Tex.—*Fleming v. State*, 376 S.W.3d 854 (Tex. App. Fort Worth 2012), petition for discretionary review granted, (Jan. 9, 2013) and judgment aff'd, 455 S.W.3d 577 (Tex. Crim. App. 2014), cert. denied, 135 S. Ct. 1159, 190 L. Ed. 2d 913 (2015).

19 Colo.—*People v. Ledman*, 622 P.2d 534 (Colo. 1981) (rejected on other grounds by, *James v. People*, 727 P.2d 850 (Colo. 1986)).

20 Colo.—*People v. Ledman*, 622 P.2d 534 (Colo. 1981) (rejected on other grounds by, *James v. People*, 727 P.2d 850 (Colo. 1986)).

21 U.S.—*Engle v. Isaac*, 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982).

22 Utah—*State v. Sommers*, 569 P.2d 1110 (Utah 1977).

23 Ark.—*Gaines v. State*, 354 Ark. 89, 118 S.W.3d 102 (2003).

Pa.—*Com. v. Robinson*, 497 Pa. 49, 438 A.2d 964 (1981).

Crime of gross sexual imposition with a person less than 15 years old

N.D.—*State v. Vandermeer*, 2014 ND 46, 843 N.W.2d 686 (N.D. 2014).

Under state constitution

Under the state constitution, the refusal to allow a mistake-of-age defense to a charge of statutory rape would violate due process.

Alaska—*State v. Fremgen*, 914 P.2d 1244 (Alaska 1996).

24 Minn.—*State v. White*, 464 N.W.2d 585 (Minn. Ct. App. 1990).

25 Ill.—*People v. Nölker*, 104 Ill. App. 3d 159, 60 Ill. Dec. 258, 432 N.E.2d 1157 (5th Dist. 1982).

26 U.S.—*Spencer v. State of Tex.*, 385 U.S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967).

Proof of prior conviction

A theft statute providing that "if the offender has previously been convicted of a theft offense, then violation of this section is grand theft, a felony ..." does not violate due process even though it makes proof of a prior theft conviction an element of the current offense.

Ohio—*State v. Green*, 2 Ohio App. 3d 38, 440 N.E.2d 615 (1st Dist. Hamilton County 1981).

27 U.S.—*Coalition for Equal Rights, Inc. v. Owens*, 458 F. Supp. 2d 1251 (D. Colo. 2006), judgment aff'd, 517 F.3d 1195 (10th Cir. 2008).

28 Ga.—*City of Atlanta v. Jones*, 283 Ga. App. 125, 640 S.E.2d 698 (2006).

29 N.H.—*State v. Akers*, 119 N.H. 161, 400 A.2d 38, 12 A.L.R.4th 667 (1979).

A.L.R. Library

Validity of Parental Responsibility Statutes and Ordinances Holding Parents Liable for Criminal Acts of Their Children, 74 A.L.R.6th 181.

30 Minn.—*State v. Young*, 294 N.W.2d 728 (Minn. 1980).

31 Idaho—*State v. Adamcik*, 152 Idaho 445, 272 P.3d 417 (2012).

16C C.J.S. Constitutional Law § 1616

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

A. In General

§ 1616. Constitutional rights regarding the creation or definition of criminal offenses—Certainty and definiteness

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4503 to 4507, 4509(1) to 4509(25), 4515

In order not to violate due process, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and that it provide ascertainable and specific standards of guilt to protect against arbitrary, erratic, and discriminatory enforcement, especially where the uncertainty adduced by the statute would threaten to inhibit the exercise of constitutionally protected rights.

At its core, the due process principle is that no person shall be held criminally responsible for conduct which he or she could not reasonably understand to be proscribed.¹ The touchstone of the due process vagueness doctrine is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.² To satisfy due process, a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited,³ and in a manner that does not encourage arbitrary and discriminatory enforcement,⁴ especially where the uncertainty adduced by the statute would threaten to inhibit the exercise of constitutionally protected rights.⁵ A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilt by the courts called upon to apply it.⁶

Stated more specifically, a criminal enactment must be sufficiently explicit, in its description of the acts, conduct, or conditions required or forbidden, so as to prescribe the elements of the offense with reasonable certainty, fix an ascertainable standard of guilt, and make known to those to whom it is addressed what conduct on their part will render them liable for its penalties and not be so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.⁷

Due process requires that the law give sufficient warning so that persons may conduct themselves so as to avoid that which is forbidden,⁸ and the "fair-warning" requirements embodied in due process prohibit the states from holding an individual criminally responsible for conduct which he or she could not reasonably understand to be proscribed,⁹ it being a fundamental tenet of due process that no one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes.¹⁰ However, due process does not demand unattainable feats of statutory clarity,¹¹ does not invalidate every statute which a reviewing court believes could have been drafted with greater precision,¹² and does not require that every term in a criminal statute be defined, especially when the words employed are in common usage and are readily understood.¹³

Although the void-for-vagueness doctrine focuses both on actual notice to citizens and arbitrary enforcement, the more important aspect of the doctrine is not actual notice, but the other principal element of the doctrine, the requirement that the legislature establish minimum guidelines to govern law enforcement,¹⁴ and due process is denied where inherently vague statutory language permits selective or discretionary law enforcement.¹⁵ Accordingly, the law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.¹⁶ Furthermore, if the scope of power given officials under a statute is so broad that the exercise of constitutionally protected conduct depends upon the subjective views of those officials as to the propriety of such conduct, the statute is unconstitutional as a denial of due process.¹⁷

A statute or ordinance which fulfills the foregoing requirements does not deny due process of law.¹⁸ Various statutes found not to deny due process include those concerning labor, monopolies, or unfair trade¹⁹ or obscene materials or sex offenses.²⁰

A statute or ordinance which fails to fulfill the foregoing requirements is violative of due process,²¹ including one particularly concerning labor, monopolies, or unfair trade,²² or obscene materials or sex offenses.²³

Grade of offense; statutes enhancing punishment.

The portion of a statute which pertains to the grade of an offense and defines the crime may be so vague that it offends due process,²⁴ and due process requirements demand that the same rule of reasonable definiteness should apply to penal statutes enhancing punishment as is mandated for all penal enactments.²⁵

Charging document or factual record.

Neither a detailed charging document nor a fully developed factual record can serve to validate a law which on its face is so vague as to violate due process.²⁶

Discretion of third party.

A statute violates due process which predicates criminal liability on the discretion of a third party.²⁷

Overbreadth.

A clear and precise enactment may nevertheless be overbroad if in its reach it prohibits constitutionally protected conduct²⁸ or mere passivity.²⁹

CUMULATIVE SUPPLEMENT

Cases:

Vague laws contravene the first essential of due process of law that statutes must give people of common intelligence fair notice of what the law demands of them. [U.S. Const. Amend. 5. United States v. Davis, 139 S. Ct. 2319 \(2019\).](#)

The constitutional principles of due process and separation of powers, underlying the rule of lenity, counsel caution before invoking constitutional avoidance to construe a criminal statute to punish conduct that it does not unambiguously proscribe. [U.S. Const. Amend. 5. United States v. Davis, 139 S. Ct. 2319 \(2019\).](#)

The void-for-vagueness doctrine under Fifth Amendment due process requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. [U.S.C.A. Const.Amend. 5. Beckles v. U.S., 137 S. Ct. 886 \(2017\).](#)

The void-for-vagueness doctrine prohibits the government, under due process principles, from imposing sanctions under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. [U.S.C.A. Const.Amend. 5, 14. Welch v. U.S., 136 S. Ct. 1257 \(2016\).](#)

The vagueness issue, on an as-applied due process challenge to a penal statute, is not whether the statute's reach is clear in every application, but whether it is clear as applied to the defendant's conduct. [U.S. Const. Amend. 5. United States v. Houtar, 980 F.3d 268 \(2d Cir. 2020\).](#)

Conviction violates due process if criminal statute on which conviction is based fails to provide person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. [U.S. Const. Amend. 5. United States v. Hoffert, 949 F.3d 782 \(3d Cir. 2020\).](#)

Vague laws are anathema to the constitution because due process requires that citizens be given adequate notice of what the law proscribes and because persons of average intelligence should not have to guess about the meaning of a penal statute. [U.S. Const. Amend. 14. State v. Morrison, 227 N.J. 295, 151 A.3d 561 \(2016\).](#)

Statute prohibiting unauthorized use of a law enforcement database system was not unconstitutionally vague, and thus conviction of defendant, who was a police officer, for unauthorized use of database was not void; as a law enforcement officer, defendant could and should have understood his duties and responsibilities with regard to utilizing the database for legitimate law enforcement purposes, and defendant was certified to operate the system, which provided adequate notice of what defendant was required to do or prohibited to do. [Ohio Rev. Code Ann. §§ 2913.04\(C\), 2913.04\(D\). State v. Garn, 2017-Ohio-2969, 91 N.E.3d 109 \(Ohio Ct. App. 5th Dist. Richland County 2017\), appeal allowed, 152 Ohio St. 3d 1406, 2018-Ohio-723, 92 N.E.3d 878 \(2018\).](#)

[END OF SUPPLEMENT]

Footnotes

- 1 U.S.—*U.S. v. Hager*, 721 F.3d 167 (4th Cir. 2013), petition for certiorari filed, 134 S. Ct. 1936, 188 L. Ed. 2d 964 (2014); *Indigo Room, Inc. v. City of Fort Myers*, 710 F.3d 1294 (11th Cir. 2013).
- 2 U.S.—*Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340 (11th Cir. 2011).
- 3 U.S.—*Skilling v. U.S.*, 561 U.S. 358, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010); *U.S. v. Farhane*, 634 F.3d 127, 84 Fed. R. Evid. Serv. 794 (2d Cir. 2011); *U.S. v. Chong Lam*, 677 F.3d 190, 90 A.L.R. Fed. 2d 653 (4th Cir. 2012); *U.S. v. Howard*, 766 F.3d 414 (5th Cir. 2014); *U.S. v. JDT*, 762 F.3d 984, 95 Fed. R. Evid. Serv. 47 (9th Cir. 2014), petition for certiorari filed (U.S. Apr. 10, 2015); *U.S. v. Baldwin*, 745 F.3d 1027 (10th Cir. 2014).
Idaho—*State v. Doe*, 148 Idaho 919, 231 P.3d 1016 (2010).
Me.—*State v. Hofland*, 2012 ME 129, 58 A.3d 1023 (Me. 2012), cert. denied, 134 S. Ct. 305, 187 L. Ed. 2d 217 (2013).
Minn.—*In re Welfare of B.A.H.*, 845 N.W.2d 158 (Minn. 2014), petition for certiorari filed, 135 S. Ct. 208, 190 L. Ed. 2d 159 (2014).
Test based on knowable criteria
A criminal statute is sufficiently definite under due process if its terms furnish a test based on knowable criteria which men of common intelligence who come in contact with the statute may use with reasonable safety in determining its command.
Ga.—*Stull v. State*, 230 Ga. 99, 196 S.E.2d 7 (1973).
- 4 U.S.—*Skilling v. U.S.*, 561 U.S. 358, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010); *U.S. v. Farhane*, 634 F.3d 127, 84 Fed. R. Evid. Serv. 794 (2d Cir. 2011); *U.S. v. Chong Lam*, 677 F.3d 190, 90 A.L.R. Fed. 2d 653 (4th Cir. 2012); *U.S. v. Howard*, 766 F.3d 414 (5th Cir. 2014); *U.S. v. JDT*, 762 F.3d 984, 95 Fed. R. Evid. Serv. 47 (9th Cir. 2014), petition for certiorari filed (U.S. Apr. 10, 2015); *U.S. v. Baldwin*, 745 F.3d 1027 (10th Cir. 2014).
Haw.—*State v. Alancas*, 131 Haw. 312, 318 P.3d 602 (Ct. App. 2013), as corrected, (Dec. 12, 2013) and cert. granted, 2014 WL 1758408 (Haw. 2014).
Idaho—*State v. Doe*, 148 Idaho 919, 231 P.3d 1016 (2010).
Me.—*State v. Hofland*, 2012 ME 129, 58 A.3d 1023 (Me. 2012), cert. denied, 134 S. Ct. 305, 187 L. Ed. 2d 217 (2013).
Minn.—*In re Welfare of B.A.H.*, 845 N.W.2d 158 (Minn. 2014), petition for certiorari filed, 135 S. Ct. 208, 190 L. Ed. 2d 159 (2014).
Workable standards
Due process requires criminal statutes to establish workable standards that ensure the law will be enforced in a nonarbitrary, nondiscriminatory manner.
Wash.—*State v. Evans*, 177 Wash. 2d 186, 298 P.3d 724 (2013).
- 5 U.S.—*Colautti v. Franklin*, 439 U.S. 379, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979).
Mich.—*Oakland County Prosecuting Attorney v. 46th Judicial Dist. Judge*, 76 Mich. App. 318, 256 N.W.2d 776 (1977).
Greater severity
Constitutional requirements of precision are all the more severe in dealing with legislation inhibiting free speech and free press.
N.J.—*State v. Jahr*, 114 N.J. Super. 181, 275 A.2d 461 (Law Div. 1971).
- 6 Cal.—*People v. Boyce*, 59 Cal. 4th 672, 175 Cal. Rptr. 3d 481, 330 P.3d 812 (2014), cert. denied, 135 S. Ct. 1428 (2015).
- 7 La.—*State v. Golston*, 67 So. 3d 452 (La. 2011).
U.S.—*Smith v. Goguen*, 415 U.S. 566, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974).
Neb.—*State v. Metzger*, 211 Neb. 593, 319 N.W.2d 459 (1982).
R.I.—*State v. Tweedie*, 444 A.2d 855 (R.I. 1982).
Tenn.—*State v. Hinsley*, 627 S.W.2d 351 (Tenn. 1982).
Rule particularly applicable to statute creating new offense
Mass.—*Com. v. Donoghue*, 4 Mass. App. Ct. 752, 358 N.E.2d 465 (1976).

- 8 U.S.—*Rose v. Locke*, 423 U.S. 48, 96 S. Ct. 243, 46 L. Ed. 2d 185 (1975); U.S. v. Hussein, 351 F.3d 9 (1st Cir. 2003).
 Conn.—*State v. Courchesne*, 296 Conn. 622, 998 A.2d 1 (2010).
 Ga.—*Pitts v. State*, 293 Ga. 511, 748 S.E.2d 426, 297 Ed. Law Rep. 565 (2013).
 As to a warning or notice as a due process requirement in the creation or definition of a criminal offense, generally, see § 1615.
- Determination of wrongfulness**
 Due process questions of vagueness and notice relate to the ability of a person to determine whether an act is wrong, not whether or not a specific punishment will be imposed for a wrongful act.
 Okla.—*Matter of M. E.*, 1978 OK CR 26, 584 P.2d 1340 (Okla. Crim. App. 1978).
- Judicial application or construction**
 (1) The construction of a statute by judicial decision becomes part of the statute, and the standard thus established may be sufficient to satisfy the due process requirement that one be given adequate warning of the offense with which he or she may be charged.
 Cal.—*People v. Strohl*, 57 Cal. App. 3d 347, 129 Cal. Rptr. 224 (2d Dist. 1976).
 (2) If a reasonable and practical construction can be given to the language of a statute, or its terms made reasonably certain by reference to other definable sources, it will not be held void for vagueness in violation of due process.
 Fla.—*Enoch v. State*, 95 So. 3d 344 (Fla. 1st DCA 2012), review denied, 108 So. 3d 654 (Fla. 2013).
- 9 U.S.—*City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67, 72 A.L.R.5th 665 (1999); U.S. v. Hager, 721 F.3d 167 (4th Cir. 2013), petition for certiorari filed, 134 S. Ct. 1936, 188 L. Ed. 2d 964 (2014); *Indigo Room, Inc. v. City of Fort Myers*, 710 F.3d 1294 (11th Cir. 2013).
 Me.—*State v. Gray*, 440 A.2d 1062 (Me. 1982).
 Pa.—*Com. v. Walker*, 298 Pa. Super. 387, 444 A.2d 1228 (1982).
 Tenn.—*State v. Thomas*, 635 S.W.2d 114 (Tenn. 1982).
- Personal notice not required**
 U.S.—*U.S. v. Gardner*, 993 F. Supp. 2d 1294 (D. Or. 2014).
- Perfect warning not required**
 Ariz.—*State v. Coulter*, 236 Ariz. 270, 339 P.3d 653 (Ct. App. Div. 1 2014).
- Scienter requirement**
 For purposes of due process analysis, a subjective scienter requirement can alleviate vagueness because an actor who knows what he or she is doing and is aware of the unlawful risk cannot be heard to claim that he or she did not know his or her conduct was prohibited.
 Wis.—*State v. Neumann*, 2013 WI 58, 348 Wis. 2d 455, 832 N.W.2d 560 (2013), cert. denied, 134 S. Ct. 544, 187 L. Ed. 2d 389 (2013).
- 10 U.S.—*U.S. v. Jones*, 689 F.3d 696 (7th Cir. 2012), cert. denied, 133 S. Ct. 895, 184 L. Ed. 2d 695 (2013).
 Utah—*State v. Perea*, 2013 UT 68, 322 P.3d 624 (Utah 2013).
- Rule-of-lenity**
 The rule-of-lenity fosters the constitutional due-process principle that no individual be forced to speculate, at peril of indictment, whether his or her conduct is prohibited.
 U.S.—*U.S. v. Bustillos-Pena*, 612 F.3d 863 (5th Cir. 2010).
- 11 U.S.—*U.S. v. Petrillo*, 332 U.S. 1, 67 S. Ct. 1538, 91 L. Ed. 1877 (1947).
 Nev.—*Carlisle v. State*, 98 Nev. 128, 642 P.2d 596 (1982).
 N.Y.—*City of Albany v. Lee*, 53 N.Y.2d 633, 438 N.Y.S.2d 782, 420 N.E.2d 974 (1981).
- Mathematical exactitude unnecessary**
 Cal.—*Clingenpeel v. Municipal Court*, 108 Cal. App. 3d 394, 166 Cal. Rptr. 573 (2d Dist. 1980).
- Reasonable clarity required**
 Colo.—*People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).
- Certainty not required**
 U.S.—*Tobacco Road v. City of Novi*, 490 F. Supp. 537 (E.D. Mich. 1979).
- Ambiguity**
 Ambiguity in the application of the statutory prohibition to marginal cases is insufficient to constitute a violation of due process, but the law prefers to avoid such ambiguity when possible.
 Mass.—*Com. v. Zone Book, Inc.*, 372 Mass. 366, 361 N.E.2d 1239 (1977).
- 12 U.S.—*Rose v. Locke*, 423 U.S. 48, 96 S. Ct. 243, 46 L. Ed. 2d 185 (1975).

Neb.—[State v. Caddy](#), 262 Neb. 38, 628 N.W.2d 251 (2001).

N.H.—[State v. Porelle](#), 149 N.H. 420, 822 A.2d 562 (2003).

Wyo.—[Saiz v. State](#), 2001 WY 76, 30 P.3d 21 (Wyo. 2001).

Absolute precision not required

Ariz.—[State v. Coulter](#), 236 Ariz. 270, 339 P.3d 653 (Ct. App. Div. 1 2014).

Statute rendered sufficiently definite by orderly processes of litigation

The fair warning requirement of due process does not demand absolute precision in the drafting of criminal statutes; a statute is not vague which by orderly processes of litigation can be rendered sufficiently definite and certain for purposes of judicial decision.

Tenn.—[State v. White](#), 362 S.W.3d 559 (Tenn. 2012).

13

Ga.—[Kennedy v. Carlton](#), 294 Ga. 576, 757 S.E.2d 46 (2014).

Ky.—[Com. v. McBride](#), 281 S.W.3d 799 (Ky. 2009), as modified, (Apr. 27, 2009).

Neb.—[State v. Faber](#), 264 Neb. 198, 647 N.W.2d 67 (2002).

S.C.—[State v. Sullivan](#), 362 S.C. 373, 608 S.E.2d 422 (2005).

Failure to include exhaustive definitions

The failure to include exhaustive definitions of every term employed in a statute will not automatically render a statute overly vague in violation of due process so long as the meaning of the statute is clear and provides a defendant sufficient notice of what conduct is proscribed.

Mont.—[State v. Dugan](#), 2013 MT 38, 369 Mont. 39, 303 P.3d 755 (2013), cert. denied, 134 S. Ct. 220, 187 L. Ed. 2d 143 (2013).

Reference to other sources

The legislature's failure to define a statutory term does not in and of itself render a penal provision unconstitutionally vague in violation of due process; in the absence of a statutory definition, resort may be had to case law or related statutory provisions which define the term.

Fla.—[DuFresne v. State](#), 826 So. 2d 272 (Fla. 2002).

14

U.S.—[Smith v. Goguen](#), 415 U.S. 566, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974); [Washington Mobilization Committee v. Cullinane](#), 566 F.2d 107 (D.C. Cir. 1977).

Fla.—[Ciccarelli v. City of Key West](#), 321 So. 2d 472 (Fla. 3d DCA 1975).

Neb.—[In Interest of D. L. H.](#), 198 Neb. 444, 253 N.W.2d 283 (1977).

15

U.S.—[Smith v. Goguen](#), 415 U.S. 566, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974).

Fla.—[Simmons v. State](#), 944 So. 2d 317 (Fla. 2006).

Mo.—[State ex rel. Williams v. Marsh](#), 626 S.W.2d 223 (Mo. 1982).

Ohio.—[City of Columbus v. New](#), 1 Ohio St. 3d 221, 438 N.E.2d 1155 (1982).

Unfettered discretion precluded

The government must not have unfettered discretion to prosecute on the basis of a statute which is so vague or of such broad applicability that even-handed administration of the law is not possible.

U.S.—[U.S. v. Simms](#), 508 F. Supp. 1179 (W.D. La. 1979).

Minimal guidelines required

To satisfy due process, the legislature must provide minimal guidelines to govern law enforcement; where the legislature fails to provide such minimal guidelines, a criminal statute otherwise would permit a standardless sweep that would allow policemen, prosecutors, and juries to pursue their personal predilections.

U.S.—[U.S. v. JDT](#), 762 F.3d 984, 95 Fed. R. Evid. Serv. 47 (9th Cir. 2014), petition for certiorari filed (U.S. Apr. 10, 2015).

Mass.—[Com. v. Reyes](#), 464 Mass. 245, 982 N.E.2d 504 (2013).

Ad hoc determination

A statute is void for vagueness under the Fourteenth Amendment if it impermissibly delegates to law enforcement the authority to arrest and prosecute on an ad hoc and subjective basis.

U.S.—[Bell v. Keating](#), 697 F.3d 445 (7th Cir. 2012).

Loitering ordinance

A city police department's general order providing guidelines for the enforcement of a city's gang loitering ordinance, including rules that restricted enforcement to certain designated areas, did not sufficiently limit the vast amount of discretion granted to police to save the ordinance from being impermissibly vague in violation of the Due Process Clause.

U.S.—[City of Chicago v. Morales](#), 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67, 72 A.L.R.5th 665 (1999).

- 16 Colo.—*People v. Latsis*, 195 Colo. 411, 578 P.2d 1055 (1978).
 La.—*State v. Hair*, 784 So. 2d 1269 (La. 2001).
 Md.—*McKenzie v. State*, 131 Md. App. 124, 748 A.2d 67, 143 Ed. Law Rep. 273 (2000).
Explicit standards required
 Ariz.—*State v. Monfeli*, 235 Ariz. 186, 330 P.3d 376 (Ct. App. Div. 1 2014).
 Ill.—*People v. Velez*, 2012 IL App (1st) 101325, 359 Ill. Dec. 703, 967 N.E.2d 433 (App. Ct. 1st Dist. 2012).
 17 U.S.—*Gable v. Jenkins*, 309 F. Supp. 998 (N.D. Ga. 1969), judgment aff'd, 397 U.S. 592, 90 S. Ct. 1351, 25 L. Ed. 2d 595 (1970).
 Alaska—*Brown v. Municipality of Anchorage*, 584 P.2d 35 (Alaska 1978).
 Fla.—*Ciccarelli v. City of Key West*, 321 So. 2d 472 (Fla. 3d DCA 1975).
Surmise or conjecture
 Penalties cannot be imposed for violations of a standard whose meaning is dependent upon surmise or conjecture or the uncontrolled application by the administrative board imposing the penalty.
 Colo.—*Trail Ridge Ford, Inc. v. Colorado Dealer Licensing Bd.*, 190 Colo. 82, 543 P.2d 1245 (1975).
 18 U.S.—*Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000); *U.S. v. Hussein*, 351 F.3d 9 (1st Cir. 2003).
 Me.—*State v. Cloutier*, 2003 ME 7, 814 A.2d 966 (Me. 2003).
 Mass.—*Com. v. Chou*, 433 Mass. 229, 741 N.E.2d 17 (2001).
 Nev.—*Williams v. State*, 118 Nev. 536, 50 P.3d 1116 (2002).
"Cruel punishment"
 The prohibition in a child abuse statute against "cruel punishment" is sufficiently precise to satisfy due process requirements.
 Colo.—*People v. Jennings*, 641 P.2d 276 (Colo. 1982).
 19 U.S.—*U.S. v. Romano*, 684 F.2d 1057, 10 Fed. R. Evid. Serv. 1495 (2d Cir. 1982).
 Me.—*Shapiro Bros. Shoe Co., Inc. v. Lewiston-Auburn Shoeworkers Protective Ass'n*, 320 A.2d 247 (Me. 1974).
 Utah—*Trade Commission v. Skaggs Drug Centers, Inc.*, 21 Utah 2d 431, 446 P.2d 958 (1968).
 20 U.S.—*Roth v. U.S.*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957).
 S.D.—*State v. Martin*, 2003 SD 153, 674 N.W.2d 291 (S.D. 2003).
 Wis.—*State v. Jadowski*, 2004 WI 68, 272 Wis. 2d 418, 680 N.W.2d 810 (2004).
 Wyo.—*Giles v. State*, 2004 WY 101, 96 P.3d 1027 (Wyo. 2004).
Sex crimes statutes
 Oregon sex crimes statutes prohibiting sexual intercourse with a person incapable of consent by reason of mental defect were not unconstitutionally vague.
 U.S.—*Anderson v. Morrow*, 371 F.3d 1027 (9th Cir. 2004) (applying Oregon law).
 21 U.S.—*Gooding v. Wilson*, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972).
 Ga.—*Foster v. State*, 273 Ga. 555, 544 S.E.2d 153 (2001).
 Ind.—*Healthscript, Inc. v. State*, 770 N.E.2d 810 (Ind. 2002).
 Nev.—*Sheriff, Washoe County v. Burdg.*, 118 Nev. 853, 59 P.3d 484 (2002).
Indecency
 The undefined term "indecent" used in a statute prohibiting a public nuisance is vague in violation of due process.
 Iowa—*State ex rel. Clemens v. ToNeCa, Inc.*, 265 N.W.2d 909 (Iowa 1978).
Loitering
 A school loitering statute which did not restrict loitering to a readily identifiable area, did not purport to prohibit loitering when it was likely to have an adverse effect on educational purposes, did not even require that conduct occur while school was in session, and described a loiterer as one not having any other specific, legitimate reason for being there, was unconstitutionally vague, in violation of due process.
 Colo.—*People in Interest of C. M.*, 630 P.2d 593 (Colo. 1981).
Nature of murder
 A statute authorizing the death penalty or life imprisonment without the possibility of parole if a jury finds as a special circumstance that a murder was "especially heinous, atrocious, or cruel, manifesting exceptional depravity," and defining the quoted phrase to mean conscienceless or pitiless crime which is unnecessarily torturous to the victim, was unconstitutionally vague and violative of fundamental due process.

- 22 Cal.—*People v. Superior Court* (Engert), 31 Cal. 3d 797, 183 Cal. Rptr. 800, 647 P.2d 76 (1982).
 La.—*City of Natchitoches v. State*, 221 So. 2d 534 (La. Ct. App. 3d Cir. 1969).
 23 Tenn.—*Leech v. American Booksellers Ass'n, Inc.*, 582 S.W.2d 738 (Tenn. 1979).
 Va.—*Martin v. Zihlerl*, 269 Va. 35, 607 S.E.2d 367 (2005).
- Antiprostitution ordinance**
 A city's antiprostitution ordinance was unconstitutionally vague based on its failure to define the term "known prostitute"; without such a definition, the ordinance failed to provide an ascertainable standard to protect against arbitrary law enforcement.
 Wash.—*City of Spokane v. Neff*, 152 Wash. 2d 85, 93 P.3d 158 (2004).
 24 La.—*State v. Baker*, 359 So. 2d 110 (La. 1978).
 25 Me.—*State v. Davenport*, 326 A.2d 1 (Me. 1974).
 26 Colo.—*People in Interest of C. M.*, 630 P.2d 593 (Colo. 1981).
 27
- Determination by bank**
 A bad check statute, by permitting a bank to determine whether guilt should attach by dishonoring the check of one customer while paying the check of another customer, violated due process.
 Colo.—*People v. Vinnola*, 177 Colo. 405, 494 P.2d 826 (1972).
 28 U.S.—*Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).
 Fla.—*State v. Bailey*, 360 So. 2d 772 (Fla. 1978).
 Mo.—*State v. Koetting*, 616 S.W.2d 822 (Mo. 1981).
- Primary issue**
 The concept of overbreadth of a penal statute rests on the principle of substantive due process which forbids the prohibition of certain individual freedoms, and the primary issue is not reasonable notice or adequate standards, but whether the language of the statute, given its normal meaning, is so broad that its sanctions may apply to conduct protected by the Constitution.
 Wis.—*State v. Zwicker*, 41 Wis. 2d 497, 164 N.W.2d 512, 32 A.L.R.3d 531 (1969).
 29 Fla.—*State v. Bailey*, 360 So. 2d 772 (Fla. 1978).

16C C.J.S. Constitutional Law § 1617

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

A. In General

§ 1617. Constitutional rights regarding the creation or definition of criminal offenses—Intent; knowledge

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4503 to 4507, 4509(1) to 4509(25), 4515

Although generally due process requires that knowledge and intent be essential elements of a crime, due process is not violated merely because mens rea is not a required element of a prescribed crime.

Generally, due process requires that knowledge and intent be essential elements of a crime.¹ However, due process is not violated merely because mens rea is not a required element of a prescribed crime,² and while it is competent for the State to create strict criminal liabilities by defining criminal offenses without any element of scienter,³ there are due process limitations on that power.⁴ Generally, if guilty knowledge as to the basic crime is shown, due process requirements of scienter are satisfied, even if a certain element of the crime is not known to the defendant,⁵ or a specific intent is not a requisite element of the crime.⁶

Substantive due process does not require the State to include the subjective intent to kill as an element in the crime of murder⁷ and does not require a preformed malicious intent to kill to sustain a felony-murder conviction.⁸ In one jurisdiction, with respect to the felony-murder rule, the law itself implies the malice from the proof of the felony and, thus, does not violate due process.⁹

Footnotes

- 1 Alaska—[Cooley v. Municipality of Anchorage](#), 649 P.2d 251 (Alaska Ct. App. 1982).
Fla.—[State v. Allen](#), 362 So. 2d 10 (Fla. 1978).
R.I.—[State v. Almeida](#), 111 R.I. 566, 304 A.2d 895 (1973).
Some scienter required
The statutory requirement of some scienter on the part of the defendant before being found guilty of neglect or refusal to support an illegitimate child immunizes the statute from a due process challenge.
Mass.—[Com. v. Chase](#), 385 Mass. 461, 432 N.E.2d 510 (1982).
Kidnapping
Criminal intent is an essential element of kidnapping and due process requires that the statute include that component.
Del.—[Wilson v. State](#), 303 A.2d 638 (Del. 1973).
U.S.—[U.S. v. Ayo-Gonzalez](#), 536 F.2d 652 (5th Cir. 1976).
Neb.—[State v. Perina](#), 282 Neb. 463, 804 N.W.2d 164 (2011).
N.M.—[State v. Barber](#), 91 N.M. 764, 1978-NMCA-059, 581 P.2d 27 (Ct. App. 1978).
Broad power or authority
(1) Given the broad authority of the legislative branch to define the elements of crimes, the requirements of due process ordinarily do not preclude the creation of offenses which lack a guilty knowledge element.
Fla.—[State v. Adkins](#), 96 So. 3d 412 (Fla. 2012).
(2) Legislatures generally have broad power to define and limit the mens rea element of criminal offenses.
Mass.—[Simon v. Solomon](#), 385 Mass. 91, 431 N.E.2d 556 (1982).
Care and caution; negligence
(1) It is not violative of due process for the legislature, in framing its criminal laws, to cast upon the public the duty of care or extreme caution.
Neb.—[State v. Vicars](#), 186 Neb. 311, 183 N.W.2d 241, 44 A.L.R.3d 1427 (1971).
(2) A statute prohibiting negligent assault, along with the statute defining criminal negligence, does not deprive a defendant of due process on the theory that they eliminate the element of intent.
Wash.—[State v. Foster](#), 91 Wash. 2d 466, 589 P.2d 789 (1979).
Public welfare
(1) When Congress exercises its regulatory powers for the public welfare, particularly in areas not known to the common law, it may for the purpose of achieving some social good make criminal actions which are taken with no awareness of wrongdoing, and even when it does so, there is no violation of due process.
U.S.—[U.S. v. Atkinson](#), 468 F. Supp. 834 (E.D. Wis. 1979).
(2) Due process is not violated by excluding criminal intent as an element of a crime, and this is especially true as to public welfare offenses and food and drug offenses.
S.D.—[State v. Nagel](#), 279 N.W.2d 911 (S.D. 1979).
U.S.—[U.S. v. Boffa](#), 513 F. Supp. 444, 7 Fed. R. Evid. Serv. 1734 (D. Del. 1980).
D.C.—[McIntosh v. Washington](#), 395 A.2d 744 (D.C. 1978).
Minn.—[State v. Rohan](#), 834 N.W.2d 223 (Minn. Ct. App. 2013), review denied, (Oct. 15, 2013).
Or.—[State v. Buttrey](#), 293 Or. 575, 651 P.2d 1075 (1982).
Statutory rape or similar crime
Ark.—[Gaines v. State](#), 354 Ark. 89, 118 S.W.3d 102 (2003).
Wis.—[State v. Jadowski](#), 2004 WI 68, 272 Wis. 2d 418, 680 N.W.2d 810 (2004).
Minn.—[Twin City Candy & Tobacco Co. v. A. Weisman Co.](#), 276 Minn. 225, 149 N.W.2d 698 (1967).
Notice
As with vague statutes, notice is a key component to a due process review of strict liability criminal statutes.
N.J.—[State v. Pomianek](#), 221 N.J. 66, 110 A.3d 841 (2015).
Affirmative duty to act
Where a statute imposes an affirmative duty to act and then penalizes the failure to comply, and where the failure to act otherwise amounts to essentially innocent conduct, the failure of the statute to require some specific intent or knowledge may violate due process.
- 2
- 3
- 4

Fla.—[State v. Oxx](#), 417 So. 2d 287 (Fla. 5th DCA 1982).

U.S.—[U.S. v. Bolin](#), 423 F.2d 834, 12 A.L.R. Fed. 654 (9th Cir. 1970).

Minn.—[State v. Reys](#), 302 Minn. 38, 223 N.W.2d 780, 78 A.L.R.3d 548 (1974).

R.I.—[State v. Bair](#), 111 R.I. 565, 305 A.2d 106 (1973).

General versus specific intent

That a statute prohibiting cruelty to animals required a general intent to commit "an act to any animal" which resulted in cruel death, or excessive or repeated infliction of unnecessary pain or suffering, rather than a specific intent to inflict pain, was reasonably related to the harm sought to be avoided, and thus, the lack of a specific intent provision did not render the statute unconstitutional on due process grounds.

Fla.—[Reynolds v. State](#), 842 So. 2d 46 (Fla. 2002).

Specific knowledge of registration

A prohibition in an act against a person's receiving or possessing a firearm which is not registered to him or her does not require specific intent, and the absence of such requirement does not violate due process.

U.S.—[U.S. v. Freed](#), 401 U.S. 601, 91 S. Ct. 1112, 28 L. Ed. 2d 356 (1971).

U.S.—[Hallowell v. Keve](#), 555 F.2d 103 (3d Cir. 1977).

U.S.—[People of Territory of Guam v. Root](#), 524 F.2d 195 (9th Cir. 1975).

Iowa.—[State v. Nowlin](#), 244 N.W.2d 596 (Iowa 1976).

Mont.—[State v. Burkhardt](#), 2004 MT 372, 325 Mont. 27, 103 P.3d 1037 (2004).

Wash.—[State v. Wanrow](#), 91 Wash. 2d 301, 588 P.2d 1320 (1978).

Underlying felony which is part of homicide

A statute governing felony-murder is not unconstitutional under the doctrine of due process on the ground that it permits a conviction of felony-murder to be predicated upon the underlying felony which is itself a part of the homicide.

Ga.—[Larkin v. State](#), 247 Ga. 586, 278 S.E.2d 365 (1981).

Predicate felony offense required intentional act

A statute defining one type of first-degree murder as causing death of a person while committing or attempting to commit criminal sexual conduct in the first or second degree with force or violence did not violate due process, notwithstanding that such murder did not require a finding of intent to cause death; such murder was felony-murder for which the predicate felony offense required an intentional act.

Minn.—[King v. State](#), 649 N.W.2d 149 (Minn. 2002).

S.C.—[Gore v. Leeke](#), 261 S.C. 308, 199 S.E.2d 755 (1973).

16C C.J.S. Constitutional Law § 1618

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

A. In General

§ 1618. Constitutional rights regarding the creation or definition of criminal offenses—Judicial action or construction

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4503 to 4507, 4509(1) to 4509(25), 4515

Judicial expansion of an existing criminal statute already on the books at the time of the commission of alleged criminal acts can be violative of due process, but only where such judicial expansion is unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue.

Generally, a definition by judicial construction comports with the requirements of due process since it provides an individual with sufficient notice of what conduct is proscribed by the statute in question¹ although a statute, plain and unambiguous on its face, may be given an application that violates due process of law.² Due process requires that criminal statutes be strictly construed against the prosecution and in favor of the defense.³

The principle on which the Ex Post Facto Clause is based, that persons have the right to a fair warning of that conduct which will give rise to criminal penalties, is protected against improper judicial action by due process,⁴ and due process standards preclude the retroactive application of an unforeseeable judicial enlargement of a criminal statute.⁵ Thus, judicial expansion of an existing criminal statute already on the books at the time of the commission of alleged criminal acts can be violative of

due process⁶ but only where such judicial expansion is unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue.⁷

However, due process does not automatically guarantee that a defendant will receive the benefit of the narrowest verbally possible construction of a previously unexplicated phrase in a criminal statute,⁸ and when a person does an act that he or she well knows to be a violation of some law, and a statute is later interpreted to cover his or her conduct in a way that does not do violence to an ordinary understanding of the English language, due process is not offended.⁹

CUMULATIVE SUPPLEMENT

Cases:

Decision of tribal Court of Appeals to recognize jurisdiction over conduct of member of Indian tribe in touching victim's breasts through her clothing at tribe's off-reservation community center did not violate due process as extended through Indian Civil Rights Act (ICRA), since decision was not unexpected and indefensible by reference to law that had been expressed prior to conduct at issue; although ordinance limited jurisdiction to on-reservation conduct, it could be subordinated to tribal constitution that mandated exercise of jurisdiction over member's conduct because his crime occurred on land owned by tribe and procedure ordinance that gave operative effect to tribe's constitutionally-mandated jurisdiction explicitly defined criminal jurisdiction by reference to constitutional definition. [U.S.C.A. Const.Amend. 14](#); Indian Civil Rights Act of 1968, § 202(a)(8), [25 U.S.C.A. § 1302\(a\)\(8\)](#). [Kelsey v. Pope](#), 809 F.3d 849 (6th Cir. 2016).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[P. A. B., Inc. v. Stack](#), 440 F. Supp. 937 (S.D. Fla. 1977).
- 2 U.S.—[U.S. v. Spector](#), 343 U.S. 169, 72 S. Ct. 591, 96 L. Ed. 863 (1952).
- 3 U.S.—[U.S. v. Chappell](#), 292 F. Supp. 494 (C.D. Cal. 1968).
Fla.—[Polite v. State](#), 973 So. 2d 1107 (Fla. 2007), as clarified, (Jan. 24, 2008).
N.J.—[State v. Reed](#), 183 N.J. Super. 184, 443 A.2d 744 (App. Div. 1982).
W. Va.—[State v. Corra](#), 223 W. Va. 573, 678 S.E.2d 306 (2009).
Rule of lenity
The canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning under federal and state due process clauses by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.
U.S.—[U.S. v. Kim](#), 808 F. Supp. 2d 44 (D.D.C. 2011).
Cal.—[People v. Nguyen](#), 212 Cal. App. 4th 1311, 151 Cal. Rptr. 3d 771 (4th Dist. 2013).
- 4 U.S.—[Marks v. U.S.](#), 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977).
Ill.—[People v. Nichols](#), 60 Ill. App. 3d 919, 18 Ill. Dec. 330, 377 N.E.2d 815 (3d Dist. 1978).
As to ex post facto laws, generally, see §§ 671 et seq.
Precisely same result
Since a state legislature is barred by the Ex Post Facto Clause from passing such a law, the state supreme court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.
U.S.—[Bouie v. City of Columbia](#), 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).
Revelation by court

The Fourteenth Amendment is violated when, because the uncertainty as to a statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in speculation as to its coverage before committing the act in question.

U.S.—*Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).

5 U.S.—*Marks v. U.S.*, 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977); *U.S. v. Sherpix, Inc.*, 512 F.2d 1361 (D.C. Cir. 1975).

Cal.—*People v. Correa*, 54 Cal. 4th 331, 142 Cal. Rptr. 3d 546, 278 P.3d 809 (2012).

Fla.—*Wilson v. State*, 288 So. 2d 480 (Fla. 1974).

Ga.—*Mitchell v. State*, 142 Ga. App. 802, 237 S.E.2d 243 (1977).

Judicial alteration of common law doctrine

When conducting a due process foreseeability analysis, for purposes of the principle that judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, the court of appeals must look only to cases decided before the crime was committed because the focus is on notice to the defendant.

U.S.—*U.S. v. Schafer*, 625 F.3d 629 (9th Cir. 2010).

Lulling of defendant

When statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his or her contemplated conduct; when a statute on its face is narrow and precise, however, it lulls a potential defendant into a false sense of security, giving him or her no reason even to suspect that conduct clearly outside scope of statute as written will be retroactively brought within it by an act of judicial construction.

U.S.—*Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).

6 U.S.—*Rogers v. Tennessee*, 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001).

Wash.—*State v. Timmons*, 12 Wash. App. 48, 527 P.2d 1399 (Div. 2 1974).

Criminal trespass statute

Where a criminal trespass statute defined the offense as unauthorized entry of a "structure" and defined "structure" as "any building of any kind ... which has a roof over it," unexpected and unforeseeable broadening of the statute to apply to the unauthorized entry into a particular part of a hospital, when defendants were lawfully in the hospital, was a denial of due process.

U.S.—*Cohen v. Katsaris*, 530 F. Supp. 1092 (N.D. Fla. 1982).

7 U.S.—*Rogers v. Tennessee*, 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001).

Foreseeability

Courts violate constitutional due process guarantees when they impose unexpected criminal penalties by construing existing laws in a manner that the accused could not have foreseen at the time of the alleged criminal conduct.

Cal.—*People v. Blakeley*, 23 Cal. 4th 82, 96 Cal. Rptr. 2d 451, 999 P.2d 675 (2000).

Decision not officially published

The claim that due process has been denied because a person was not given adequate notice of what the law prohibited may not be premised on the fact that a prior decision of the appeals court which was relied upon by the trial court in determining guilt had not been officially published pursuant to law.

Ohio—*State v. George*, 50 Ohio App. 2d 297, 4 Ohio Op. 3d 259, 362 N.E.2d 1223 (10th Dist. Franklin County 1975).

8 U.S.—*Knutson v. Brewer*, 619 F.2d 747 (8th Cir. 1980).

Elements not enlarged; new crime not created

A defendant was not deprived of due process by the application of the judicial interpretation of a statute permitting finding the defendant guilty of any degree of the offense inferior to the one charged where the substantive elements of the offenses were not enlarged by the interpretation, and the interpretation did not create a substantive crime subsequent to the defendant's actions.

Mo.—*Rogers v. State*, 625 S.W.2d 185 (Mo. Ct. App. E.D. 1981).

9 U.S.—*Knutson v. Brewer*, 619 F.2d 747 (8th Cir. 1980).

Application of state privacy act

The application of the state privacy act, which prohibits the use of an electronic amplifying or recording device to eavesdrop upon or record a confidential communication, to a defendant for videotaping himself and women engaged in sexual activity, did not violate due process; the defendant should have known that recording sexual activity without the women's consent was violating their right of privacy.

Cal.—[People v. Gibbons](#), 215 Cal. App. 3d 1204, 263 Cal. Rptr. 905 (4th Dist. 1989).

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16C C.J.S. Constitutional Law § 1619

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

A. In General

§ 1619. Constitutional rights pertaining to jurisdiction and venue in criminal proceedings and prosecutions

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4559, 4560

In order to satisfy the constitutional guaranty of due process in a criminal case, the court must have jurisdiction of the person and the offense, and power to pass on the constitutionality of the statute on which the accusation is based; and the judge, justice, or magistrate must not be disqualified by prejudice or personal interest.

Denial of due process of law may result from a departure from established principles of law in matters of jurisdiction or venue,¹ as in the case of a trial without jurisdiction to try the case,² failure of the trial court to acquire jurisdiction by due process,³ or a withdrawal from all courts of the state, except the highest court, of power to pass on state constitutional questions.⁴ The presence in the trial court of jurisdiction of the person and of the offense, however, satisfies the constitutional requirement of due process.⁵

While the right to a trial in the state where the crime has been committed applies to trials by the federal courts and has not been required of the states by the Fourteenth Amendment,⁶ due process of law is not denied by a statute which makes amenable to the penal laws of the state a person⁷ or corporation committing a crime in whole or in part therein,⁸ or which provides for a prosecution in either county where a person receives an injury in one county and dies, as a result of such injury, in another county.⁹ Moreover, a state statute providing jurisdiction over conduct outside the state which constitutes a conspiracy to commit

an offense within the state, if an act in furtherance of the conspiracy occurs in the state, has been found to be consistent with the notions of fundamental fairness embodied in the Fourteenth Amendment.¹⁰

A statute establishing venue when a crime is committed in more than one county has been found adequately to provide a mechanism to carry into effect the mandate of a state constitution that criminal trials be held in the county in which the crime is committed and thus is not unconstitutionally vague or indefinite so as to violate due process.¹¹ Furthermore, due process is not denied by the bringing of a prosecution for murder in the city and county wherein the accused resides instead of the county wherein the crime is actually committed, in the absence of a showing that the accused is not put to disadvantage in procuring witnesses or attending the trial.¹² Nor is due process denied by a state law which authorizes the acceptance of a plea of guilty and the imposition of sentence in a county other than the one in which the offense is committed¹³ or which authorizes the state in a felony case to petition for a change of venue.¹⁴

Denial of a motion for change of venue is not necessarily a denial of due process¹⁵ although a court's refusal to grant the accused a pretrial hearing to introduce evidence in support of his or her motion for change of venue constitutes a deprivation of due process.¹⁶ Furthermore, due process is not denied by the fact that one accused of a misdemeanor has no right to move for a change of venue where there is no showing of any fact constituting cause for a change of venue¹⁷ although to deny an accused, the right to a change of venue or place of trial from a county where he or she cannot be tried by an impartial jury is to deny him or her the fair trial guaranteed by the Due Process Clause.¹⁸

Accordingly, it has been found in particular cases that a denial of a motion for a change of venue sought by an accused on the ground of adverse pretrial publicity does not deny due process¹⁹ where the publicity complained of is routine,²⁰ largely factual rather than inflammatory,²¹ not hostile;²² where the press coverage is minimal,²³ where the bulk of it occurs at a point in time removed from the time of the trial;²⁴ or where there had been an adequate voir dire.²⁵

The Constitution's place-of-trial prescriptions do not impede transfer of the proceeding to a different district at the defendant's request if extraordinary local prejudice will prevent a fair trial, a basic requirement of due process.²⁶ Under federal law, although a defendant can waive his or her right to be tried in the state and district where the crime has been committed, he or she cannot, in all cases, compel a transfer of the case to another district without government approval and consent.²⁷ Furthermore, except under prosecutions for crimes which give a statutory right to the accused to be tried in the district of his or her residence,²⁸ an accused in the federal courts is not deprived of due process of law by the selection for trial, with regard to an offense cognizable in more than one district, of a district other than that of his or her residence.²⁹

Nevertheless, there may be cases where the failure to hold a trial in an accused's home district would work such hardship on the accused as to constitute a denial of due process.³⁰ Additionally, an accused is not denied due process where no treaty is involved and the accused is in the custody of the proper officers in the jurisdiction wherein the indictment is pending, by the fact that he or she has been unlawfully removed to such jurisdiction.³¹ It is likewise not a denial of due process of law to require one who has been returned from another state by force and without the formality of an extradition procedure to face criminal charges in the state to which he or she is returned,³² and the fact that federal authorities deliver a prisoner to a state court for trial does not violate any of the due process provisions of the state or federal constitutions.³³

In addition, due process is not denied by the fact that a state which refuses to accept a tendered surrender of a prisoner of another state retains the right to reassert jurisdiction over the prisoner when he or she has completed his or her sentence in the other state.³⁴ The trial of a member of the armed forces by a civilian tribunal is not necessarily a denial of due process.³⁵

The guaranty of due process of law is not a guaranty of any particular form of tribunal in criminal cases,³⁶ or of the same tribunal for the trial of all classes of offenses.³⁷ It is not necessarily infringed by statutory provisions for a special session of court for the trial of criminal cases³⁸ or for a special court³⁹ or special judges for the trial of specific persons or classes of persons.⁴⁰ The guaranty of due process is infringed, however, by the unauthorized appointment of a special judge,⁴¹ or by a statute which makes it the mandatory duty of the governor, on the mere application of the prosecutor, to appoint a special judge to hold an extra term.⁴² Furthermore, a statute allowing the accused to choose the trial magistrate makes an unjustifiable discrimination where it is confined to a single county.⁴³

Where a constitutional grant of jurisdiction is permissive, due process is not violated by a statute divesting a court of exclusive original jurisdiction of certain offenses and granting another court concurrent jurisdiction over such offenses.⁴⁴

In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States so that such application would not be arbitrary or fundamentally unfair.⁴⁵ The application of a federal act to extraterritorial conduct does not violate the Due Process Clause where an attempted transaction is aimed at causing criminal acts within the United States.⁴⁶

Juvenile offenders.

A statute providing that if the juvenile court, after an investigation or trial of disciplinary measures, concludes a juvenile offender is past reformation, it may put him or her to trial in a court that would have had jurisdiction but for the juvenile law, is not invalid as violating the constitutional provisions with respect to due process of law.⁴⁷ Furthermore, the sentence of a juvenile on his or her plea of non vult by a judge of, and in, a court of general jurisdiction, who is the same judge who would sit in the juvenile court, is not a denial of due process.⁴⁸

CUMULATIVE SUPPLEMENT

Cases:

Persons of or associated with the Islamic faith suffered injury-in-fact as result of police surveillance program designed to monitor the lives of Muslims, their businesses, houses of worship, organizations, and schools, as required to give them Article III standing to challenge the constitutionality of the program under the establishment and free exercise clauses of the First Amendment and the equal protection clause of the Fourteenth Amendment; discriminatory classification alone was sufficient, even if it did not involve a tangible benefit or overt condemnation of the Muslim religion. [U.S.C.A. Const. Art. 3, § 2, cl. 1](#); [U.S.C.A. Const.Amends. 1, 14. Hassan v. City of New York, 804 F.3d 277 \(3d Cir. 2015\)](#).

State court's determination, that John Doe complaint and arrest warrant were sufficient under Wisconsin law to satisfy requirements of personal jurisdiction and toll statute of limitations, did not constitute ex post facto judicial decisionmaking violating due process, precluding habeas relief, even though John Doe complaint and warrant did not include John Doe's specific DNA profile, as amended complaint did, since John Doe complaint and warrant identified defendant, using best-available technology, by describing John Doe's DNA profile at specified locations as "matching" DNA profiles of semen samples recovered from five sexual assault victims, and state court's extension of cases finding specific DNA profiles sufficient was not unexpected and indefensible departure from Wisconsin law. [U.S. Const. Amend. 14](#); [28 U.S.C.A. § 2254\(d\)](#); [Wis. Stat. Ann. § 968.04\(3\)\(a\)4. Washington v. Boughton, 884 F.3d 692 \(7th Cir. 2018\)](#).

The animating principle governing the due process limits of extraterritorial jurisdiction, to the extent such limits exist, is the idea that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. U.S. Const. Amend. 5. *In re Sealed Case*, 936 F.3d 582 (D.C. Cir. 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 Colo.—*Canon City v. Manning*, 43 Colo. 144, 95 P. 537 (1908).
Va.—*Mickens v. Com.*, 178 Va. 273, 16 S.E.2d 641 (1941).
Proof of venue
The defendant was deprived of due process by his confinement on a conviction without proof of venue.
U.S.—*Jones v. Russell*, 299 F. Supp. 970 (E.D. Tenn. 1969).
Reasons for transfers
A court must state its reasons for its decision that its retention of a proceeding is inappropriate, and its method of deciding such question raises due process issues.
N.Y.—*Montalvo v. Montalvo*, 55 Misc. 2d 699, 286 N.Y.S.2d 605 (Fam. Ct. 1968).- 2 Ariz.—*State v. Rockerfeller*, 117 Ariz. 151, 571 P.2d 297 (Ct. App. Div. 1 1977).- 3 Ala.—*Hutchins v. State*, 22 Ala. App. 646, 119 So. 250 (1928).- 4 Colo.—*People v. Max*, 70 Colo. 100, 198 P. 150 (1921).- 5 U.S.—*U.S. ex rel. Rogalski v. Jackson*, 58 F. Supp. 218 (N.D. N.Y. 1944), order aff'd, 146 F.2d 251 (C.C.A. 2d Cir. 1944).
Wyo.—*Crouse v. State*, 384 P.2d 321 (Wyo. 1963).- 6 Ill.—*People v. Pascarella*, 92 Ill. App. 3d 413, 48 Ill. Dec. 1, 415 N.E.2d 1285 (3d Dist. 1981).- 7 Cal.—*People v. Botkin*, 9 Cal. App. 244, 98 P. 861 (1st Dist. 1908).- 8 U.S.—*Waters-Pierce Oil Co. v. State of Texas*, 212 U.S. 86, 29 S. Ct. 220, 53 L. Ed. 417 (1909).- 9 Tex.—*Compton v. State*, 105 Tex. Crim. 516, 289 S.W. 54 (1926).- 10 Ill.—*People v. Pascarella*, 92 Ill. App. 3d 413, 48 Ill. Dec. 1, 415 N.E.2d 1285 (3d Dist. 1981).- 11 Ga.—*Adsitt v. State*, 248 Ga. 237, 282 S.E.2d 305 (1981).- 12 Mich.—*People v. Lee*, 334 Mich. 217, 54 N.W.2d 305 (1952).- 13 U.S.—*Duggan v. O'Grady*, 114 F.2d 561 (C.C.A. 8th Cir. 1940).- 14 Iowa.—*State v. District Court of Jefferson County*, 213 Iowa 822, 238 N.W. 290, 80 A.L.R. 339 (1931).- 15 Pa.—*Com. v. Shaddock*, 168 Pa. Super. 376, 77 A.2d 673 (1951).
Discretion limited by due process rights
While the granting or denial of a change of venue is left to the sound discretion of the trial court, that discretion is limited by the due process rights of the defendant.
Okla.—*Childress v. State*, 2000 OK CR 10, 1 P.3d 1006 (Okla. Crim. App. 2000), as corrected, (May 22, 2000).- 16 U.S.—*Pamplin v. Mason*, 364 F.2d 1 (5th Cir. 1966).
Tex.—*O'Brient v. State*, 588 S.W.2d 940 (Tex. Crim. App. 1979).
Hearing after remand
Defendants were not denied due process of law because the assignment judge, without a hearing, designated a particular county as the venue for a trial of the indictments returned by the state grand jury where, after remand from the supreme court, the assignment judge gave the defendants a full opportunity to be heard on the question of venue.
N.J.—*State v. Zicarelli*, 122 N.J. Super. 225, 300 A.2d 154 (App. Div. 1973).- 17 Ga.—*McIntyre v. State*, 190 Ga. 872, 11 S.E.2d 5, 134 A.L.R. 813 (1940).- 18 U.S.—*Groppi v. Wisconsin*, 400 U.S. 505, 91 S. Ct. 490, 27 L. Ed. 2d 571 (1971).
Ky.—*Sluss v. Commonwealth*, 450 S.W.3d 279 (Ky. 2014).
Tex.—*Henley v. State*, 576 S.W.2d 66 (Tex. Crim. App. 1978).

Pretrial publicity

When an impartial jury cannot be empaneled due to pretrial publicity, change of venue at a defendant's request is appropriate to prevent violation of the defendant's due process right to fair trial.

U.S.—[Murray v. Schriro](#), 746 F.3d 418 (9th Cir. 2014); [Sechrest v. Baker](#), 816 F. Supp. 2d 1017 (D. Nev. 2011), *aff'd*, 2015 WL 926623 (9th Cir. 2015).

Accused's expenditure not issue

Statutes dealing with change of venue for bias and prejudice of the justice of the peace and dealing with change of venue for bias and prejudice of citizens of the precinct are constitutional and do not deny due process even though they do not provide basis for change of venue of a criminal trial when the location is such as to require large expenditures on the part of the defendant in order to travel from his or her place of residence to the place of trial.

Ariz.—[State v. Rich](#), 27 Ariz. App. 207, 553 P.2d 240 (Div. 1 1976).

Only one venue change

A state statute authorizing one change of venue was not subject to constitutional attack for a violation of due process when the state supreme court had interpreted the statute to allow a second change of venue if necessary to secure an impartial jury.

U.S.—[Irvin v. Dowd](#), 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).

Actual prejudice

(1) In a highly publicized case, where there is an absence of presumed prejudice, the trial court, in deciding whether denial of a change of venue would violate due process, has the responsibility to confront the fact of publicity and determine if it rises to the level of actual prejudice; searching voir dire of prospective jurors is the primary tool to determine if the impact of publicity rises to that level.

U.S.—[Ritchie v. Rogers](#), 313 F.3d 948, 2002 FED App. 0426P (6th Cir. 2002).

(2) A due process violation can occur when publicity surrounding a case is of such an extensive and invidious nature as to constitute prejudice per se, in which case actual prejudice need not be shown; however, when circumstances endangering local impartiality do not reach that level, the defendant must show actual prejudice among venire persons to be entitled to a change of venue.

Me.—[State v. Grant](#), 418 A.2d 154 (Me. 1980).

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[Interrogation or Poll of Jurors, During Criminal Trial, as to Whether They Were Exposed to Media Publicity Pertaining to Alleged Crime or Trial](#), 55 A.L.R.6th 157.

U.S.—[In re Luallen](#), 321 F. Supp. 1236 (E.D. Tenn. 1970), *aff'd*, 453 F.2d 428 (6th Cir. 1971).

Ga.—[Lingo v. State](#), 224 Ga. 333, 162 S.E.2d 1 (1968).

Pervasive misleading pretrial publicity required

Mere jury exposure to news accounts of a crime does not presumptively deprive a defendant of due process so as to warrant a change of venue; instead, to warrant a change of venue, a defendant must show the existence of pervasive misleading pretrial publicity.

Neb.—[State v. Rodriguez](#), 272 Neb. 930, 726 N.W.2d 157 (2007).

Juror exposure to certain information

While adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed, for the purposes of a motion for change of venue, juror exposure to information about a defendant's prior convictions or to news accounts of the crime with which he or she is charged do not alone presumptively deprive the defendant of due process.

N.H.—[State v. Addison](#), 165 N.H. 381, 87 A.3d 1 (2013).

Prejudice presumed only in extreme circumstances

The existence of extensive pretrial publicity does not alone trigger a due process entitlement to a change of venue; rather, the supreme court will presume prejudice only in extreme circumstances.

Colo.—[People v. Harlan](#), 8 P.3d 448 (Colo. 2000), as modified on denial of reh'g, (Sept. 11, 2000) and (overruled on other grounds by, [People v. Miller](#), 113 P.3d 743 (Colo. 2005)).

U.S.—[U.S. v. Schwartzenberger](#), 457 F.2d 380 (9th Cir. 1972).

U.S.—[Murphy v. State of Fla.](#), 495 F.2d 553 (5th Cir. 1974), judgment *aff'd*, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975).

U.S.—[Collins v. Egeler](#), 539 F.2d 597 (6th Cir. 1976).

Wash.—[State v. Braun](#), 82 Wash. 2d 157, 509 P.2d 742 (1973).

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- 24 U.S.—*Murphy v. State of Fla.*, 495 F.2d 553 (5th Cir. 1974), judgment *aff'd*, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975).
- 25 U.S.—*Wansley v. Slayton*, 487 F.2d 90 (4th Cir. 1973); U.S. v. *Schwartzenberger*, 457 F.2d 380 (9th Cir. 1972).
- Me.—*State v. Littlefield*, 374 A.2d 590 (Me. 1977).
- 26 U.S.—*Skilling v. U.S.*, 561 U.S. 358, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010); *Price v. Allen*, 679 F.3d 1315 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1493, 185 L. Ed. 2d 548 (2013); U.S. v. *Warren*, 989 F. Supp. 2d 494 (E.D. La. 2013).
- 27 U.S.—U.S. v. *Herbst*, 565 F.2d 638 (10th Cir. 1977).
- 28 U.S.—U.S. v. *DeMarco*, 401 F. Supp. 505 (C.D. Cal. 1975), judgment *aff'd*, 550 F.2d 1224 (9th Cir. 1977).
- 29 U.S.—U.S. v. *Noland*, 495 F.2d 529 (5th Cir. 1974); U.S. v. *Testa*, 548 F.2d 847, 1 Fed. R. Evid. Serv. 1307 (9th Cir. 1977).

Obscenity

Prosecutors may elect to bring obscenity charges against a defendant in either the district of dispatch or the district of receipt without running afoul of the Due Process Clause.

- U.S.—U.S. v. *Bagnell*, 679 F.2d 826, 10 Fed. R. Evid. Serv. 1329 (11th Cir. 1982).
- 30 U.S.—U.S. v. *Noland*, 495 F.2d 529 (5th Cir. 1974).
- 31 U.S.—U.S. v. *Insull*, 8 F. Supp. 310 (N.D. Ill. 1934).
- 32 U.S.—*Frisbie v. Collins*, 342 U.S. 519, 72 S. Ct. 509, 96 L. Ed. 541 (1952).
- Me.—*Olson v. Thurston*, 393 A.2d 1320 (Me. 1978).
- W. Va.—*Brooks v. Boles*, 151 W. Va. 576, 153 S.E.2d 526 (1967).
- 33 Ill.—*People ex rel. Hesley v. Ragen*, 396 Ill. 554, 72 N.E.2d 311 (1947).
- 34 U.S.—*Braun v. Rhay*, 416 F.2d 1055 (9th Cir. 1969).
- 35 U.S.—*Owens v. U.S.*, 383 F. Supp. 780 (M.D. Pa. 1974), *aff'd*, 515 F.2d 507 (3d Cir. 1975).
- 36 Mass.—*Com. v. Millen*, 289 Mass. 441, 194 N.E. 463 (1935).
- 37 Ga.—*McIntyre v. State*, 190 Ga. 872, 11 S.E.2d 5, 134 A.L.R. 813 (1940).
- La.—*State v. Jacques*, 171 La. 994, 132 So. 657 (1931).
- 38 Vt.—*State v. Alfred*, 87 Vt. 157, 88 A. 534 (1913).
- 39 U.S.—*In re Claasen*, 140 U.S. 200, 11 S. Ct. 735, 35 L. Ed. 409 (1891).
- 40 U.S.—U.S. v. *New York, N.H. & H.R. Co.*, 165 F. 742 (C.C.D. Mass. 1908).
- 41 Tex.—*Oates v. State*, 56 Tex. Crim. 571, 121 S.W. 370 (1909).
- 42 S.C.—*State v. Gossett*, 117 S.C. 76, 108 S.E. 290, 16 A.L.R. 1299 (1921).
- 43 Tenn.—*Ford v. State*, 150 Tenn. 327, 263 S.W. 60 (1924).
- 44 N.Y.—*People v. Revell*, 93 Misc. 2d 159, 402 N.Y.S.2d 522 (Dist. Ct. 1978).
- 45 U.S.—U.S. v. *Al Kassar*, 660 F.3d 108 (2d Cir. 2011).

Citizenship

Citizenship alone is sufficient to satisfy due process concerns for extraterritorial exercise of a federal criminal statute.

U.S.—U.S. v. *McVicker*, 979 F. Supp. 2d 1154 (D. Or. 2013).

Exceptions; notice or fair warning

(1) Due process does not require a nexus between the United States and a foreign defendant accused of piracy because the universal condemnation of the offender's conduct puts him or her on notice that his or her acts will be prosecuted by any state where he or she is found.

U.S.—U.S. v. *Shi*, 525 F.3d 709 (9th Cir. 2008).

(2) Fair warning, as an element of the test for determining whether extraterritorial application of a statute complies with due process, does not require that the defendants understand that they could be subject to criminal prosecution in the United States so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere.

U.S.—U.S. v. *Naseer*, 38 F. Supp. 3d 269 (E.D. N.Y. 2014).

- 46 U.S.—U.S. v. *Davis*, 905 F.2d 245 (9th Cir. 1990).

Aim of activity to cause harm inside United States

For noncitizens acting entirely abroad, a jurisdictional nexus exists, as required for extraterritorial application of a statute to be applied consistent with due process, when the aim of that activity is to cause harm inside the United States or to U.S. citizens or interests.

U.S.—U.S. v. Al Kassar, 660 F.3d 108 (2d Cir. 2011); U.S. v. Naseer, 38 F. Supp. 3d 269 (E.D. N.Y. 2014).

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Ala.—Macon v. Holloway, 19 Ala. App. 234, 96 So. 933 (1923).

Utah—Mayne v. Turner, 24 Utah 2d 195, 468 P.2d 369 (1970).

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N.J.—Ex parte Johnson, 31 N.J. Super. 382, 106 A.2d 560 (Law Div. 1954), judgment *aff'd*, 18 N.J. 422, 114 A.2d 1 (1955).

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16C C.J.S. Constitutional Law § 1620

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

A. In General

§ 1620. Constitutional rights pertaining to former jeopardy

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3855, 4563 to 4566

The double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal which applies to the states through the Due Process Clause of the Fourteenth Amendment.

The double jeopardy prohibition of the Fifth Amendment is so fundamental that its basic core must be included within the equally fundamental constitutional right of due process,¹ and it applies to the states through the Fourteenth Amendment.² Thus, due process prohibits a second prosecution for the same offense following acquittal,³ prohibits a second prosecution for the same offense after conviction,⁴ and prohibits multiple punishments for the same offense arising out of a single prosecution.⁵ Accordingly, where a state imposes consecutive sentences at a single trial for the violation of two distinct statutory provisions which in effect constitute one offense, there is a violation of the defendant's right to due process.⁶

On the other hand, due process is not denied by the prosecution and punishment of an accused for two separate, distinct crimes, even though the second offense follows the first in quick succession⁷ and is for the purpose for which the first offense is committed.⁸ Moreover, due process has been found not violated by prosecutions for separate and distinct offenses committed during a single course of conduct when the essential elements of each offense require proof of different facts.⁹ Where it is

established that the accused has committed two or more separate offenses which are sufficiently distinguishable, therefore, due process is not violated by the imposition of separate cumulative sentences.¹⁰

The refiling of charges by the prosecution after the defendant's motion to dismiss for lack of prosecution is sustained does not deny due process.¹¹ Although the Due Process Clause prevents a retrial where the appropriate circumstances of manifest necessity and the ends of justice do not exist for granting a mistrial,¹² there are instances where the circumstances support the declaration of a mistrial, and thus, a retrial would not violate due process.¹³ Similarly, there is no denial of due process per se when one who has appealed from a conviction of a crime in a state court and has the conviction set aside is retried for the same offense.¹⁴

Collateral estoppel.

Collateral estoppel simply means that when an issue of ultimate fact has once been determined by a valid final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.¹⁵ It is embodied in the Fifth Amendment guaranty against double jeopardy and is applicable to the states through the Fourteenth Amendment.¹⁶ Thus, it has been found that due process mandates the application of the doctrine of collateral estoppel in state criminal prosecutions to evidence previously suppressed in another state prosecution¹⁷ although due process would forbid relitigation by a state of an issue determined adversely to it in a suppression hearing only in those cases where the State has had an opportunity for a hearing and at least one appeal as of right.¹⁸

CUMULATIVE SUPPLEMENT

Cases:

Statute governing when a prior prosecution for a different offense bars a new prosecution did not apply to retrial on included offenses following a first trial that ended in a deadlocked jury, and a second trial that ended with defendant's acquittal on the greater second-degree murder charge and a jury deadlock on lesser-included offenses; retrial was not "new prosecution," but merely a "continuation" of the original prosecution. [Haw. Rev. Stat. § 701-111](#). [State v. Deedy](#), 141 Haw. 208, 407 P.3d 164 (2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[U.S. v. Security Nat. Bank](#), 546 F.2d 492 (2d Cir. 1976).
 - 2 As to the double jeopardy prohibition, generally, see C.J.S., [Criminal Law](#) §§ 265 to 338.
 - U.S.—[Benton v. Maryland](#), 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969); [Delgado v. Florida Dept. of Corrections](#), 659 F.3d 1311 (11th Cir. 2011).
 - Conn.—[State v. Terwilliger](#), 314 Conn. 618, 104 A.3d 638 (2014).
 - Md.—[Scriber v. State](#), 437 Md. 399, 86 A.3d 1260 (2014).
 - Miss.—[Hardy v. State](#), 137 So. 3d 289 (Miss. 2014).
 - Wash.—[Harris v. Charles](#), 171 Wash. 2d 455, 256 P.3d 328 (2011).
- Fourteenth Amendment does not provide greater protection**
 The Due Process Clause of the Fourteenth Amendment does not provide greater double jeopardy protection than the Double Jeopardy Clause.

U.S.—*Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003); U.S. v. *Neto*, 659 F.3d 194 (1st Cir. 2011).

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Former jeopardy as bar to retrial of criminal defendant after original trial court's sua sponte declaration of a mistrial—state cases, 40 A.L.R.4th 741.

Double Jeopardy Considerations in State Criminal Cases—Supreme Court Cases, 77 A.L.R. Fed. 2d 477.

Double jeopardy considerations in federal criminal cases—Supreme Court cases, 162 A.L.R. Fed. 415.

3 Wash.—*State v. Birgen*, 33 Wash. App. 1, 651 P.2d 240 (Div. 1 1982) (disapproved of on other grounds by, *State v. Smith*, 177 Wash. 2d 533, 303 P.3d 1047 (2013)).

Insufficient evidence to sustain conviction

Once a reviewing court has found the evidence insufficient to sustain a conviction, a second trial upon the same charge is precluded.

Tex.—*Alaniz v. State*, 635 S.W.2d 818 (Tex. App. San Antonio 1982).

4 Wash.—*State v. Birgen*, 33 Wash. App. 1, 651 P.2d 240 (Div. 1 1982) (disapproved of on other grounds by, *State v. Smith*, 177 Wash. 2d 533, 303 P.3d 1047 (2013)).

Lesser-included offense

A conviction for a lesser-included offense after a conviction for a greater crime violates the Fifth Amendment protections as applied by the Fourteenth Amendment to the states.

W. Va.—*State ex rel. Hall v. Strickler*, 168 W. Va. 496, 285 S.E.2d 143 (1981).

5 Wash.—*State v. Birgen*, 33 Wash. App. 1, 651 P.2d 240 (Div. 1 1982) (disapproved of on other grounds by, *State v. Smith*, 177 Wash. 2d 533, 303 P.3d 1047 (2013)).

Credit for time served

(1) The Double Jeopardy Clause necessarily and absolutely requires that time already served, including time credits earned for good behavior during service of an erroneous first prison sentence, be fully credited in imposing sentence upon a new conviction for the same offense, and such constitutional requirement is obligatory upon the states.

Me.—*Weeks v. State*, 267 A.2d 641 (Me. 1970).

(2) A state statute requiring one whose probation is revoked to be dealt with as if there had been no probation or suspension of the sentence does not violate the due process guaranty against double jeopardy; hence, a prisoner was not entitled to have time spent on probation credited against his or her sentence, which had been imposed on conviction and suspended but which was automatically activated on the revocation of probation.

U.S.—*Hall v. Bostic*, 529 F.2d 990 (4th Cir. 1975).

Legislative intent

Because the substantive power to prescribe crimes and determine punishments is vested with the legislature, the question under the Double Jeopardy Clause of the Fifth and Fourteenth Amendments whether punishments are "multiple" is essentially one of legislative intent.

U.S.—*Ohio v. Johnson*, 467 U.S. 493, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984).

6 U.S.—*U. S. ex rel. Stewart v. Redman*, 470 F. Supp. 50 (D. Del. 1979).

As to the identity of offenses, generally, see C.J.S., *Criminal Law* § 307.

7 Ill.—*People v. Armstrong*, 127 Ill. App. 2d 457, 262 N.E.2d 354 (1st Dist. 1970).

N.C.—*State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978).

Successive prosecutions

A defendant was not denied due process or the constitutional protection against double jeopardy by successive prosecutions for murders committed in two counties.

Cal.—*People v. Marlow*, 34 Cal. 4th 131, 17 Cal. Rptr. 3d 825, 96 P.3d 126 (2004).

8 N.C.—*State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978).

9 U.S.—*Boswell v. Young*, 314 F. Supp. 1330 (D. Minn. 1970).

Prosecution under wrong statute

Prosecution of a defendant on a charge of violating a statute governing the conduct of drivers of trucks or buses after a prior charge of violation of a statute governing the conduct of drivers of other vehicles had been dismissed did not violate due process where the defendant was not charged with the same criminal act for which he was initially tried, and the prior prosecution had been dismissed solely because it was brought under the wrong statute.

Mo.—*State ex rel. Lang v. Hodge*, 608 S.W.2d 432 (Mo. Ct. App. E.D. 1980).

As to several offenses involved in the same transaction, generally, see C.J.S., [Criminal Law § 314](#).

10 U.S.—[Bruce v. Duckworth](#), 659 F.2d 776 (7th Cir. 1981); U.S. v. [Thomas](#), 586 F.2d 123, 4 Fed. R. Evid. Serv. 370 (9th Cir. 1978).

11 Okla.—[Browning v. State](#), 1982 OK CR 113, 648 P.2d 1261 (Okla. Crim. App. 1982).

12 Pa.—[Com. v. Stroup](#), 244 Pa. Super. 173, 366 A.2d 1248 (1976).

13 U.S.—[Smith v. State of Miss.](#), 478 F.2d 88 (5th Cir. 1973).

N.J.—[State v. Antieri](#), 186 N.J. Super. 20, 451 A.2d 189 (App. Div. 1982).

As to consent to a motion for a mistrial, generally, see C.J.S., [Criminal Law § 296](#).

14 Me.—[State v. Bessey](#), 328 A.2d 807 (Me. 1974).

Possibility of greater sentence

A two-tier court system, under which a defendant is first placed on trial before a district court judge and then required to appeal to superior court if he or she desires trial de novo before a jury, does not violate the Fifth Amendment as applied to the states through the Fourteenth Amendment, despite the contention that the possible imposition of a higher sentence by a superior court in a de novo trial on appeal "chills" the defendant's right to take an appeal and that the mere existence of authority in the superior court to impose a greater sentence in itself violates the Double Jeopardy Clause.

Mass.—[Whitmarsh v. Com.](#), 366 Mass. 212, 316 N.E.2d 610 (1974).

As to double jeopardy issues when a judgment is reversed on appeal, generally, see C.J.S., [Criminal Law §§ 304, 305](#).

15 U.S.—[Harris v. Washington](#), 404 U.S. 55, 92 S. Ct. 183, 30 L. Ed. 2d 212 (1971).

16 U.S.—[Harris v. Washington](#), 404 U.S. 55, 92 S. Ct. 183, 30 L. Ed. 2d 212 (1971).

Ariz.—[State v. Stauffer](#), 112 Ariz. 26, 536 P.2d 1044 (1975).

Neb.—[State v. Bruckner](#), 287 Neb. 280, 842 N.W.2d 597 (2014).

Tex.—[Ex parte Bolivar](#), 386 S.W.3d 338 (Tex. App. Corpus Christi 2012).

17 U.S.—[U. S. ex rel. DiGiangiemo v. Regan](#), 528 F.2d 1262 (2d Cir. 1975).

18 Mass.—[Com. v. Scala](#), 380 Mass. 500, 404 N.E.2d 83 (1980).

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16C C.J.S. Constitutional Law § 1621

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

A. In General

§ 1621. Constitutional rights pertaining to extradition and detainees

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 4490

Due process of law is applicable to extradition proceedings.

A fugitive subject to extradition proceedings has some degree of protection under the Fourteenth Amendment Due Process Clause, even apart from whatever procedural protections with respect to extradition he or she may have under the law of the asylum state.¹ In the absence of any right under a detainer agreement with another state to petition the governor to disapprove extradition, the failure to give the accused notice of his or her ability to petition the governor does not violate due process.²

Furthermore, in the absence of a right to notice of the existence of the waiting period during which the accused cannot be delivered to the demanding state, the failure to give the accused such notice does not violate due process.³ An inordinate delay in reviewing a prisoner's protest of extradition proceedings deprives him or her of due process.⁴

Hearing.

Due process may require a hearing before the extradition of a fugitive.⁵

Right to counsel.

The lack of counsel in extradition proceedings does not deny due process.⁶ However, where a criminal review process is granted by a state as a matter of right, rather than discretion, and the defendant is entitled to counsel in such proceedings, due process of law requires that he or she have the benefit of effective representation;⁷ thus, in the extradition context, where an alleged fugitive has a right to challenge the legality of his or her arrest and the right to counsel in doing so, he or she is entitled to effective representation.⁸

International extradition.

Where the United States itself acts to detain a relator pending extradition, it is bound to accord him or her due process;⁹ thus, where a treaty already does not do so, the Fourth Amendment binds preliminary detentions in the United States to the probable cause standard.¹⁰

Since the due process right to be heard before a deprivation of life, liberty, or property does not grant immunity to an individual who falls within the category of persons extraditable under a treaty, it may not be available to delay extradition to permit the conclusion of a pending civil litigation involving the fugitive.¹¹ The discretion given the executive to extradite United States nationals does not violate due process, despite the contention that no standards are provided to guide the exercise of such discretion, where due process rights are safeguarded by statutory provisions.¹² Furthermore, the extradition statute does not deny due process in permitting an American citizen to be held for extradition on deposition evidence which would not be admissible at a preliminary hearing on a domestic crime.¹³

The Sixth Amendment right to a speedy trial and the Fifth Amendment right against undue delay are inapplicable to an extradition.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

A defendant may rebut the presumption that a judge acted fairly, impartially, and without prejudice by showing that the appearance of bias reveals a great risk of actual bias; such a showing constitutes a due process violation. (Per Bradley, J., with four justices concurring.) [U.S.C.A. Const.Amend. 14](#). [State v. Herrmann, 2015 WI 84, 867 N.W.2d 772 \(Wis. 2015\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1** [U.S.—Raffone v. Sullivan, 436 F. Supp. 939 \(D. Conn. 1977\)](#).
Opportunity to be heard
Constitutional due process prohibits the bundling up and shipment of a human being from one state to another without an opportunity to be heard, no matter how limited in scope the available defenses against extradition may be.
[Wash.—In re Personal Restraint of Jian Liu, 150 Wash. App. 484, 208 P.3d 1207 \(Div. 1 2009\)](#).
Compelling a choice

Compelling a defendant, who was incarcerated in another state, either to waive his or her right to an extradition hearing or to suffer the consequences of a conviction for failure to appear in a criminal case for which he had previously agreed to be present, did not violate the defendant's due process rights.

Iowa—*State v. Gay*, 526 N.W.2d 294 (Iowa 1995).

Pa.—*Com. ex rel. Coleman v. Cuyler*, 261 Pa. Super. 274, 396 A.2d 394 (1978).

Pa.—*Com. ex rel. Coleman v. Cuyler*, 261 Pa. Super. 274, 396 A.2d 394 (1978).

U.S.—*Horne v. Wilson*, 316 F. Supp. 247 (E.D. Tenn. 1970).

U.S.—*Berenguer v. Vance*, 473 F. Supp. 1195 (D.D.C. 1979).

Cross-examination of government's affiants

A defendant was not deprived of due process, in an extradition proceeding, by his or her inability to cross-examine the government's three affiants.

U.S.—*In re Gambino*, 421 F. Supp. 2d 283 (D. Mass. 2006).

U.S.—*U. S. ex rel. Hunt v. Russell*, 285 F. Supp. 765 (E.D. Pa. 1968), judgment aff'd, 406 F.2d 774 (3d Cir. 1969).

Minn.—*Wertheimer v. State*, 294 Minn. 293, 201 N.W.2d 383 (1972).

Tex.—*Ex parte Potter*, 21 S.W.3d 290 (Tex. Crim. App. 2000).

Tex.—*Ex parte Potter*, 21 S.W.3d 290 (Tex. Crim. App. 2000).

Competency of fugitive

Due process and the right to counsel under the Uniform Criminal Extradition Act (UCEA), demand that an alleged fugitive be sufficiently competent to communicate and assist counsel with the limited defenses available in an extradition proceeding.

Wash.—*In re Personal Restraint of Jian Liu*, 150 Wash. App. 484, 208 P.3d 1207 (Div. 1 2009).

U.S.—*In re Extradition of Skaftouros*, 643 F. Supp. 2d 535 (S.D. N.Y. 2009).

U.S.—*In re Extradition of Skaftouros*, 643 F. Supp. 2d 535 (S.D. N.Y. 2009).

U.S.—*Sindona v. Grant*, 461 F. Supp. 199 (S.D. N.Y. 1978), judgment aff'd, 619 F.2d 167 (2d Cir. 1980).

U.S.—*Castillo v. Forsht*, 450 U.S. 922, 101 S. Ct. 1371, 67 L. Ed. 2d 350 (1981); *Escobedo v. U.S.*, 623 F.2d 1098 (5th Cir. 1980).

U.S.—*Wacker v. Bisson*, 370 F.2d 552 (5th Cir. 1967).

U.S.—*In re Rodriguez Ortiz*, 444 F. Supp. 2d 876 (N.D. Ill. 2006).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

B. Validity of Searches and Seizures

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Research References

A.L.R. Library

A.L.R. Index, Civil Rights and Discrimination
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A.L.R. Index, Criminal Law
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16C C.J.S. Constitutional Law § 1622

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

B. Validity of Searches and Seizures

§ 1622. Constitutional rights pertaining to the validity of searches and seizures, in general

[Topic Summary](#) | [References](#) | [Correlation Table](#)

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Generally, in criminal proceedings the Fourth Amendment prohibition against unreasonable searches and seizures is enforceable against the states through the Due Process Clause of the Fourteenth Amendment, and the standards of reasonableness or probable cause are the same under either Amendment.

Generally, in criminal proceedings, the Fourth Amendment prohibition against unreasonable searches and seizures is enforceable against the states through the Due Process Clause of the Fourteenth Amendment¹ although there is no constitutional prohibition against private actions with respect to illegal searches and seizures which, if instituted under the color of state law, would be prohibited.² The standards of reasonableness³ or probable cause are the same under either the Fourth or the Fourteenth Amendment.⁴

A warrantless search is per se⁵ or presumptively⁶ unreasonable under the Due Process Clause⁷ unless it is within one of the recognized exceptions to the warrant requirement.⁸ Included among such exceptions are searches made pursuant to a valid consent,⁹ or as an incident to a lawful arrest,¹⁰ or searches justifiable under the "plain view" doctrine, or made in "hot pursuit" or emergency situations, or where exigent circumstances exist coincidental with probable cause, or in "stop and frisk" situations.¹¹

Retention of seized property.

The continued retention of seized property may in some circumstances be a constitutional deprivation¹² though the continued retention of seized property does not violate a defendant's due process rights if such items are evidence of crime, and they may be retained in anticipation of forfeiture or for confiscation as contraband.¹³ Furthermore, when law enforcement agents seize property pursuant to a warrant, due process requires them to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return.¹⁴ Finally, a property owner's due process rights are not violated, even if a seizure is unreasonable, if the State provides adequate postdeprivation remedies that satisfy due process.¹⁵

Issuance of warrant.

Generally, a state is not prevented by due process from issuing a warrant to search for evidence simply because the owner or possessor of the place to be searched is not reasonably suspected of criminal involvement.¹⁶ However, the issuance of a search warrant by a judicial officer effects a violation of due process where his or her financial welfare is enhanced by positive action with respect to the warrant and not enhanced by negative action,¹⁷ though permitting a magistrate, in determining whether to issue a search warrant, to place reliance on the act of a magistrate of a sister state does not violate due process.¹⁸

A search warrant must particularly describe the place to be searched and person or thing to be seized, and affidavits supporting the warrant need not particularly describe the place, person, or thing but must contain a showing of probable cause for the issuance of the warrant.¹⁹ In addition, due process does not require that the government make a complete and detailed accounting of all police investigatory work on a case when applying for a search warrant.²⁰ In order that a defendant may, under due process, challenge the truthfulness of the factual statements made in the affidavit supporting a search warrant, the defendant must make a substantial showing that a false statement knowingly and intentionally or with reckless disregard for the truth has been made by the affiant in his or her affidavit.²¹ Moreover, such showing must be supported by an offer of proof, and this part of the defendant's showing must be more than conclusory and must be supported by more than a mere desire to cross-examine.²²

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Footnotes

- 1 U.S.—*Bailey v. U.S.*, 133 S. Ct. 1031, 185 L. Ed. 2d 19 (2013); *Roaden v. Kentucky*, 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973); *Massey v. Ojaniit*, 759 F.3d 343 (4th Cir. 2014); *Burlison v. Springfield Public Schools*, 708 F.3d 1034, 289 Ed. Law Rep. 542 (8th Cir. 2013), cert. denied, 134 S. Ct. 151, 187 L. Ed. 2d 39 (2013); *U.S. v. Timmann*, 741 F.3d 1170 (11th Cir. 2013).
Conn.—*State v. Kelly*, 313 Conn. 1, 95 A.3d 1081 (2014).
Ky.—*Com. v. Bucalo*, 422 S.W.3d 253 (Ky. 2013).
Md.—*Barnes v. State*, 437 Md. 375, 86 A.3d 1246 (2014).
N.D.—*State v. Dahl*, 2015 ND 72, 860 N.W.2d 844 (N.D. 2015).
Application to state agents
Claims brought pursuant to the Fourth Amendment, applied to the states by virtue of the Fourteenth Amendment, apply to the actions of state agents.
Me.—*Clifford v. MaineGeneral Medical Center*, 2014 ME 60, 91 A.3d 567 (Me. 2014).
- 2 Cal.—*People v. Superior Court of Los Angeles County*, 70 Cal. 2d 123, 74 Cal. Rptr. 294, 449 P.2d 230 (1969).
Iowa—*Moose v. Rich*, 253 N.W.2d 565 (Iowa 1977).
Search by bus company employees
The search of a defendant's trunk by bus company employees who found it in the men's room of a bus terminal did not violate the defendant's Fourth or Fourteenth Amendment rights.

Ariz.—*State v. Loyd*, 126 Ariz. 364, 616 P.2d 39 (1980).

U.S.—*U.S. v. Valdes*, 876 F.2d 1554 (11th Cir. 1989); *U.S. v. McSurely*, 473 F.2d 1178 (D.C. Cir. 1972).
Cal.—*People v. Webb*, 66 Cal. 2d 107, 56 Cal. Rptr. 902, 424 P.2d 342, 19 A.L.R.3d 708 (1967).

Reasonableness is legal conclusion

U.S.—*U.S. v. Williams*, 343 F.3d 423 (5th Cir. 2003).

Md.—*Collins v. State*, 17 Md. App. 376, 302 A.2d 693 (1973).

Okla.—*Bell v. State*, 1980 OK CR 15, 608 P.2d 1159 (Okla. Crim. App. 1980).

U.S.—*Collier v. Miller*, 414 F. Supp. 1357 (S.D. Tex. 1976).

D.C.—*Basnueva v. U.S.*, 874 A.2d 363 (D.C. 2005).

La.—*State v. Jolla*, 384 So. 2d 370 (La. 1980).

Fla.—*Login v. State*, 394 So. 2d 183 (Fla. 3d DCA 1981).

Mo.—*State v. Moomey*, 581 S.W.2d 899 (Mo. Ct. App. E.D. 1979).

U.S.—*Collier v. Miller*, 414 F. Supp. 1357 (S.D. Tex. 1976).

Ala.—*Murray v. State*, 396 So. 2d 125 (Ala. Crim. App. 1980), writ denied, 396 So. 2d 132 (Ala. 1981).

D.C.—*Basnueva v. U.S.*, 874 A.2d 363 (D.C. 2005).

La.—*State v. Jolla*, 384 So. 2d 370 (La. 1980).

State bears burden to prove warrantless search falls within exception

Ind.—*Jackson v. State*, 890 N.E.2d 11 (Ind. Ct. App. 2008).

U.S.—*Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

Ala.—*Murray v. State*, 396 So. 2d 125 (Ala. Crim. App. 1980), writ denied, 396 So. 2d 132 (Ala. 1981).

D.C.—*Basnueva v. U.S.*, 874 A.2d 363 (D.C. 2005).

Mass.—*Com. v. Rogers*, 444 Mass. 234, 827 N.E.2d 669 (2005).

Consent must be voluntary given

The Fourth and Fourteenth Amendments of the United States Constitution require that consent to a search must be voluntarily given and not the result of duress or coercion, express or implied.

Ark.—*Guzman v. State*, 283 Ark. 112, 672 S.W.2d 656 (1984).

N.J.—*State v. Lamb*, 218 N.J. 300, 95 A.3d 123 (2014).

U.S.—*U.S. v. LeFevre*, 685 F.2d 897 (4th Cir. 1982).

Ala.—*Murray v. State*, 396 So. 2d 125 (Ala. Crim. App. 1980), writ denied, 396 So. 2d 132 (Ala. 1981).

Ariz.—*State v. Castillo*, 114 Ariz. 577, 562 P.2d 1075 (Ct. App. Div. 2 1977).

Ala.—*Murray v. State*, 396 So. 2d 125 (Ala. Crim. App. 1980), writ denied, 396 So. 2d 132 (Ala. 1981).

Due process protections subsumed within Fourth Amendment analysis

Where the plain view doctrine justifies a warrantless seizure for valid law enforcement purposes in a criminal investigation under the Fourth Amendment, any deprivation due process protections are necessarily subsumed within the Fourth Amendment analysis.

U.S.—*PPS, Inc. v. Faulkner County, Ark.*, 630 F.3d 1098 (8th Cir. 2011).

Exigent circumstances

(1) Exigent circumstances sufficient to justify a seizure without a due process hearing exist when (a) the seizure is carried out by a government official, pursuant to a narrowly drawn statute; (b) it is necessary to secure an important public or governmental interest; and (c) there is a need for prompt action.

U.S.—*Padberg v. McGrath-McKechnie*, 108 F. Supp. 2d 177 (E.D. N.Y. 2000).

(2) Police officers' warrantless seizure of defendant's computers was justified under the exigent circumstances exception to the search warrant requirement; officers believed defendant had child pornography on his computers, seizure was necessary to prevent defendant from destroying the computer images, and the images were vulnerable to quick destruction, irreplaceable, and essential to proving that a crime had been committed.

Ga.—*Hesrick v. State*, 308 Ga. App. 363, 707 S.E.2d 574 (2011).

U.S.—*Barker v. Norman*, 651 F.2d 1107, 32 Fed. R. Serv. 2d 1010 (5th Cir. 1981); *Case v. Eslinger*, 555 F.3d 1317 (11th Cir. 2009); *Kauffman v. Pennsylvania Soc. for the Prevention of Cruelty to Animals*, 766 F. Supp. 2d 555 (E.D. Pa. 2011).

Ohio—*State v. Posey*, 135 Ohio App. 3d 751, 735 N.E.2d 903 (9th Dist. Summit County 1999).

As to due process concerns in connection with the retention of allegedly obscene material, see § 1627.

Retention of automobile

In a prisoner's suit seeking an order directing the police department to return his confiscated automobile to his mother, the prisoner stated a claim that the retention of the automobile deprived him or her of his property without due process of law, where the evidentiary use of the automobile had long expired, but the plaintiff was still without his property, and the deprivation occurred without a hearing or any other semblance of due process.

U.S.—[Toins v. Ignash](#), 534 F. Supp. 452 (E.D. Mich. 1982).

13 U.S.—[Serio v. Baltimore County](#), 115 F. Supp. 2d 509 (D. Md. 2000).

Derivative contraband

The taking of the defendant's property did not violate his due process rights; defendant's clothing was seized during a murder investigation, and the defendant was not entitled to the return of the property as it constituted derivative contraband.

Pa.—[Com. v. Durham](#), 2010 PA Super 216, 9 A.3d 641 (2010).

14 U.S.—[City of West Covina v. Perkins](#), 525 U.S. 234, 119 S. Ct. 678, 142 L. Ed. 2d 636 (1999).

Notice and hearing necessary

The issuance of warrants to seize a landowner's property without affording notice and a hearing to the landowner, and in the absence of exigent circumstances, rendered the warrants invalid and violated the landowner's right to due process.

U.S.—[U.S. v. 2751 Peyton Woods Trail](#), 66 F.3d 1164 (11th Cir. 1995).

15 U.S.—[Mora v. The City Of Gaithersburg, MD](#), 519 F.3d 216 (4th Cir. 2008); [U.S. v. Luis](#), 966 F. Supp. 2d 1321 (S.D. Fla. 2013), *aff'd*, 564 Fed. Appx. 493 (11th Cir. 2014), petition for certiorari filed, 83 U.S.L.W. 3269 (U.S. Oct. 7, 2014).

Action for conversion

U.S.—[Case v. Eslinger](#), 555 F.3d 1317 (11th Cir. 2009).

Writ of replevin

U.S.—[Revell v. Port Authority of New York, New Jersey](#), 598 F.3d 128 (3d Cir. 2010).

Return of property upon evidence of ownership

U.S.—[Dukore v. District of Columbia](#), 970 F. Supp. 2d 23 (D.D.C. 2013).

Notice of state law remedies

When the police seize property for a criminal investigation, due process does not require them to provide the owner with notice of state law remedies which are established by published, generally available state statutes and case law.

U.S.—[City of West Covina v. Perkins](#), 525 U.S. 234, 119 S. Ct. 678, 142 L. Ed. 2d 636 (1999).

Postdeprivation remedy inadequate

Refusal by a city, pursuant to established policy, to return arrestee's handgun and ammunition following dismissal of an unlawful-use-of-a-weapon charge against the arrestee, or thereafter when authorities deactivated the warrant for the arrestee's arrest, violated the arrestee's procedural due process rights, inasmuch as a post-hoc state tort action was inherently insufficient to address the deprivation.

U.S.—[Walters v. Wolf](#), 660 F.3d 307 (8th Cir. 2011).

16 U.S.—[Bergna v. Stanford Daily](#), 439 U.S. 885, 99 S. Ct. 232, 58 L. Ed. 2d 200 (1978); [Zurcher v. Stanford Daily](#), 436 U.S. 547, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978).

17 U.S.—[Connally v. Georgia](#), 429 U.S. 245, 97 S. Ct. 546, 50 L. Ed. 2d 444 (1977).

18 U.S.—[Clemas v. U.S.](#), 382 F.2d 403 (8th Cir. 1967).

19 S.D.—[State v. Kaseman](#), 273 N.W.2d 716 (S.D. 1978).

20 N.H.—[State v. Breest](#), 116 N.H. 734, 367 A.2d 1320 (1976).

21 U.S.—[U.S. v. Brian](#), 507 F. Supp. 761 (D.R.I. 1981), *aff'd*, 700 F.2d 1, 12 Fed. R. Evid. Serv. 545 (1st Cir. 1983).

22 U.S.—[U.S. v. Brian](#), 507 F. Supp. 761 (D.R.I. 1981), *aff'd*, 700 F.2d 1, 12 Fed. R. Evid. Serv. 545 (1st Cir. 1983).

16C C.J.S. Constitutional Law § 1623

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

B. Validity of Searches and Seizures

§ 1623. Constitutional rights pertaining to administrative searches or inspections

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 3854, 4460 to 4462

Under due process, a defendant has various rights with regard to administrative searches or inspections including Fourth Amendment rights.

To be constitutional, the subject of an administrative search must, among other things, be afforded an opportunity to obtain precompliance review before a neutral decisionmaker.¹ A facial challenge under the Fourth Amendment to an administrative inspection statute is not categorically barred or especially disfavored.²

Searches conducted outside the judicial process are per se unreasonable under the Fourth Amendment, subject only to several exceptions, and one of those exceptions is for administrative searches.³ The controlling question is whether authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.⁴ A statute providing for the maintenance of business records and for administrative searches may be facially unconstitutional where it provides no opportunity for precompliance review⁵ although the actual review need occur only when there is an objection to the turning over of records.⁶

Under due process, it has been found that a defendant cannot be prosecuted for exercising his or her constitutional right to insist that a fire inspector obtain a warrant authorizing entry upon the defendant's commercial premises.⁷ Furthermore, a provision of a statute authorizing reasonable inspections in investigations of business premises has been deemed to violate due process to the extent that it authorizes warrantless searches.⁸ Similarly, a provision of a municipal code which gives a city authority to prosecute a property owner who refuses to allow a city housing inspector to conduct an inspection of his or her premises, when the inspectors are proceeding without a search warrant, has been determined to be a violation of the property owner's due process rights.⁹

A warrantless search necessarily resulting from the enforcement of ordinances, requiring persons, under certain circumstances, to have their buildings inspected by city inspectors, has been found to be unconstitutional under the Fourth Amendment as applied to the states through the Due Process Clause of the Fourteenth Amendment.¹⁰ Conversely, in certain instances, it has been found that administrative searches or inspections without a search warrant do not violate due process¹¹ as where it is found that the acceptance of a license to operate a particular activity constitutes an implied consent to the supervision and inspection required by the licensing statute.¹²

CUMULATIVE SUPPLEMENT

Cases:

If an administrative search of a home, to assure compliance with building codes, is made without a warrant, the person whose home is to be searched must be afforded an opportunity to obtain pre-compliance review before a neutral decisionmaker, and the review scheme at a minimum must give the person a meaningful chance to contest an administrative-search request in front of a neutral party before the search occurs. *U.S. Const. Amend. 4. Gardner v. Evans*, 920 F.3d 1038 (6th Cir. 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*See v. Seattle*, 387 U.S. 541, 87 S.Ct. 1737 (1967).
- 2 U.S.—*City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443 (2015).
- 3 U.S.—*Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727 (1967).
- 4 U.S.—*Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727 (1967).
- 5 U.S.—*City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443 (2015).
- 6 U.S.—*City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443 (2015).
- 7 U.S.—*See v. City of Seattle*, 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967).
- 8 N.C.—*Gooden v. Brooks*, 39 N.C. App. 519, 251 S.E.2d 698 (1979).
- 9 U.S.—*Weisdorffer v. Tufaro*, 492 F. Supp. 261 (E.D. La. 1980).
- 10 Ohio—*Cincinnati Bd. of Realtors, Inc. v. City of Cincinnati*, 47 Ohio App. 2d 267, 1 Ohio Op. 3d 341, 353 N.E.2d 898 (1st Dist. Hamilton County 1975), judgment aff'd, 46 Ohio St. 2d 138, 75 Ohio Op. 2d 190, 346 N.E.2d 666 (1976).
- 11 Cal.—*People v. White*, 259 Cal. App. 2d Supp. 936, 65 Cal. Rptr. 923 (App. Dep't Super. Ct. 1968).
 N.Y.—*People v. Tinnen*, 99 Misc. 2d 962, 417 N.Y.S.2d 840 (Sup 1979).
Warrantless administrative search of pawnshop
 U.S.—*Winters v. Board of County Com'rs*, 4 F.3d 848 (10th Cir. 1993).
Public garages and repair shops
 Va.—*Shirley v. Com.*, 218 Va. 49, 235 S.E.2d 432 (1977).

12

Cal.—[People v. White](#), 259 Cal. App. 2d Supp. 936, 65 Cal. Rptr. 923 (App. Dep't Super. Ct. 1968).

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16C C.J.S. Constitutional Law § 1624

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

B. Validity of Searches and Seizures

§ 1624. Constitutional rights pertaining to eavesdropping or electronic surveillance in criminal proceedings and prosecutions

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3854, 4460 to 4462

Eavesdropping is a search within the meaning of the Fourth and Fourteenth Amendments and is applicable to the states; however, there is no basis for the claim that due process precludes any electronic surveillance.

In general, eavesdropping is a search within the meaning of the Fourth and Fourteenth Amendments.¹ However, there is no basis for the claim that due process precludes any electronic surveillance.²

Various statutes relating to wire interception and interception of oral communications,³ or eavesdropping and surveillance, have been found not to violate due process generally.⁴ In more particular terms, it has been determined that a statute relating to eavesdropping satisfies the constitutional requirement that a neutral and detached authority be between the police and the public.⁵ On the other hand, it has been found that a statute relating to eavesdropping which is too broad in its sweep violates due process.⁶

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Footnotes

1 Ohio—[State v. Person](#), 34 Ohio Misc. 97, 63 Ohio Op. 2d 406, 298 N.E.2d 922 (Mun. Ct. 1973).

2 U.S.—[U.S. v. Cafero](#), 473 F.2d 489 (3d Cir. 1973).

Due process rights not violated

A defendant's due process rights were not violated when the defendant's fiance, wearing a wire at law enforcement's behest while visiting the defendant in jail, encouraged the defendant to tell her the truth and informed him that she would be talking to police and would not lie to them.

Fla.—[Jones v. State](#), 756 So. 2d 243 (Fla. 5th DCA 2000).

A.L.R. Library

[Constitutionality of Secret Video Surveillance](#), 91 A.L.R.5th 585.

[Observation through binoculars as constituting unreasonable search](#), 59 A.L.R.5th 615.

3 U.S.—[U.S. v. Best](#), 363 F. Supp. 11 (S.D. Ga. 1973).

Ga.—[Dudley v. State](#), 228 Ga. 551, 186 S.E.2d 875 (1972).

4 Ga.—[Granese v. State](#), 232 Ga. 193, 206 S.E.2d 26 (1974).

Foreign Intelligence Surveillance Act (FISA) ex parte procedure complied with due process

U.S.—[U.S. v. Warsame](#), 547 F. Supp. 2d 982 (D. Minn. 2008).

Consent of one party

A statute which leaves a state's attorney with the decision of whether to record conversations with the consent of one of the parties thereto does not deny due process.

Ill.—[People v. Richardson](#), 60 Ill. 2d 189, 328 N.E.2d 260 (1975).

5 U.S.—[Berger v. State of N.Y.](#), 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967).

6 U.S.—[Berger v. State of N.Y.](#), 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967).

16C C.J.S. Constitutional Law § 1625

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

B. Validity of Searches and Seizures

§ 1625. Constitutional rights regarding internal body searches including withdrawal of blood, removal of bullets, strip searches, and the like

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 3854, 4460, 4461

Because of the special insult to human dignity involved when the police seek evidence in body apertures or bodily fluids, special rules restrict internal body searches, and if the bodily intrusion is conducted by means so patently abusive as to shock the conscience, the search may violate due process.

Because of the special insult to human dignity involved when the police seek evidence in body apertures or bodily fluids, special rules restrict internal body searches, and if the bodily intrusion is conducted by means so patently abusive as to shock the conscience, the search may violate due process.¹ In determining whether a body cavity search violates a defendant's right to due process, the decision must be based on a community sense of what is decent and fair, not on anyone's personal conceptions of civilized conduct.²

An intrusion into the body of a suspect, if conducted by medical personnel in a medical environment and according to accepted medical practices, will not alone violate due process.³ Accordingly, invasions of the body of the accused may be made under certain circumstances without constituting a denial of due process, if done by medical personnel using proper medical procedures

and if done without brutality which shocks the conscience,⁴ but internal body searches which fail to meet such criteria have been found to be a deprivation of due process.⁵

Contents of mouth.

Under the circumstances of various cases, the actions of police or other governmental officials in conducting a search and/or seizure with respect to the contents of an individual's mouth have been considered to constitute,⁶ or not to constitute, a deprivation of due process.⁷

Withdrawal of blood.

In general, the mere withdrawal of blood under medically acceptable conditions does not, per se, shock the conscience⁸ or deny due process.⁹ Especially, there is no denial of due process by reason of the taking of a blood sample where the defendant has consented thereto.¹⁰

Removal of bullet.

The surgical removal, pursuant to a search warrant, of a bullet superficially lodged in the side of a defendant has been found not to violate his or her right of due process where the removal of the bullet is without damage to life or limb.¹¹

Strip searches.

Strip searches, which are peculiarly intrusive, are constrained by the due process requirements of reasonableness and require special justification.¹² However, it has been held that only those strip searches that are maliciously motivated, unrelated to institutional security, and hence totally without penological justification are considered unconstitutional under the Due Process Clause of the Fourteenth Amendment, and accordingly, to state a due process claim, a pretrial detainee must allege that the strip search was conducted in a harassing manner intended to humiliate and inflict psychological pain.¹³

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Footnotes

- 1 Colo.—[People v. Williams](#), 192 Colo. 249, 557 P.2d 399 (1976).
- 2 U.S.—[U. S. ex rel. Guy v. McCauley](#), 385 F. Supp. 193 (E.D. Wis. 1974).
- 3 Cal.—[People v. Bracamonte](#), 15 Cal. 3d 394, 124 Cal. Rptr. 528, 540 P.2d 624 (1975).
- 4 Cal.—[People v. Jones](#), 20 Cal. App. 3d 201, 97 Cal. Rptr. 492 (2d Dist. 1971).
Surgical removal of cocaine from stomach to save defendant's life
 Tex.—[Lewis v. State](#), 56 S.W.3d 617 (Tex. App. Texarkana 2001).
Exigent circumstances
 In the absence of exigent circumstances, procedural due process required that a burglary suspect be given notice of a search warrant application for a buccal swab used to obtain his or her DNA sample.
 N.Y.—[People v. Fomby](#), 103 A.D.3d 28, 956 N.Y.S.2d 633 (3d Dep't 2012), leave to appeal denied, 21 N.Y.3d 1015, 971 N.Y.S.2d 497, 994 N.E.2d 393 (2013).
A.L.R. Library
 Admissibility, in criminal case, of physical evidence obtained without consent by surgical removal from person's body, 41 A.L.R.4th 60.
- 5 U.S.—[Huguez v. U.S.](#), 406 F.2d 366 (9th Cir. 1968).

- 6 La.—[State v. Tapp](#), 353 So. 2d 265 (La. 1977).
 7 U.S.—[U.S. v. Caldera](#), 421 F.2d 152 (9th Cir. 1970).
 Ariz.—[State ex rel. Flournoy v. Wren](#), 108 Ariz. 356, 498 P.2d 444 (1972).
 La.—[State v. Reed](#), 712 So. 2d 572 (La. Ct. App. 1st Cir. 1998), writ denied, 729 So. 2d 572 (La. 1998).
 8 Colo.—[People v. Williams](#), 192 Colo. 249, 557 P.2d 399 (1976).
 9 La.—[State v. Reed](#), 712 So. 2d 572 (La. Ct. App. 1st Cir. 1998), writ denied, 729 So. 2d 572 (La. 1998).

Alcohol testing

When the extraction of blood from an individual for alcohol testing without the actual consent of the individual is done with probable cause and in a reasonable manner, there is no violation of constitutional guarantees of due process and against self-incrimination and unreasonable search and seizure.

La.—[State v. Green](#), 91 So. 3d 315 (La. Ct. App. 2d Cir. 2012).

Due process rights violated

A defendant's due process rights were violated, even though he consented to the withdrawal of blood, when he was shackled to a hospital bed and held down by six persons while another person withdrew his blood at the direction of police officers while the defendant was resisting.

Ohio—[State v. Sisler](#), 114 Ohio App. 3d 337, 683 N.E.2d 106 (2d Dist. Clark County 1995).

DNA data bank

(1) Statutes providing for a state's DNA data bank, which statutes include a requirement that all convicted felons submit blood samples for DNA testing, do not violate due process.

Va.—[Johnson v. Com.](#), 259 Va. 654, 529 S.E.2d 769 (2000).

(2) A prisoner was not denied procedural due process when a DNA specimen was collected and his DNA profile disclosed in state and national DNA index systems without a predeprivation hearing.

U.S.—[Wilson v. Collins](#), 517 F.3d 421 (6th Cir. 2008).

10 Wash.—[State v. Kuljis](#), 70 Wash. 2d 168, 422 P.2d 480 (1967).

11 Ga.—[Allison v. State](#), 129 Ga. App. 364, 199 S.E.2d 587 (1973).

12 Va.—[Kidd v. Com.](#), 38 Va. App. 433, 565 S.E.2d 337 (2002).

13 U.S.—[Streeter v. Sheriff of Cook County](#), 576 F. Supp. 2d 913 (N.D. Ill. 2008).

16C C.J.S. Constitutional Law § 1626

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

B. Validity of Searches and Seizures

§ 1626. Constitutional rights pertaining to vehicle stop and detention of occupants and searches and seizures of vehicles

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3854, 4460, 4461

In relation to due process, stopping an automobile and detaining its occupants constitute a seizure within the meaning of the Fourth and Fourteenth Amendments even though the purpose of the stop is limited and the resulting detention is quite brief.

In relation to due process, stopping an automobile and detaining its occupants constitute a seizure within the meaning of the Fourth and Fourteenth Amendments even though the purpose of the stop is limited and the resulting detention is quite brief.¹ Thus, the standard of reasonableness determines the legality of the stop, and such standard requires at least an articulable and reasonable suspicion that either the vehicle or an occupant is otherwise subject to seizure for a violation of law.²

Where probable cause exists, the warrantless examination of the exterior of an automobile is not unreasonable under due process.³ Under the circumstances of the case, it has also been found that the warrantless search of an automobile is not unreasonable within the meaning of the Due Process Clause.⁴ The warrantless seizure of an automobile and the examination of its interior for the purpose of determining identity does not violate due process where, prior to the seizure of the automobile,

there is probable cause to believe that it is a stolen vehicle,⁵ and the seizure of items from the automobile of a defendant does not violate his or her due process rights where the defendant freely and voluntarily authorizes the search of his or her automobile.⁶

High-speed police chases.

High-speed police chases with no intent to harm the suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment for deprivation of substantive due process, redressable by action under § 1983.⁷

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Footnotes

- 1 U.S.—*Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).
N.M.—*State v. Skippings*, 2014-NMCA-117, 338 P.3d 128 (N.M. Ct. App. 2014).
A.L.R. Library
Permissibility under Fourth Amendment of Investigatory Traffic Stop Based Solely on Anonymous Tip Reporting Drunk Driving, 84 A.L.R.6th 293.
- 2 Ill.—*People v. Carlton*, 81 Ill. App. 3d 738, 37 Ill. Dec. 420, 402 N.E.2d 310 (3d Dist. 1980).
Reasonable seizure shown
It was reasonable under the Fourth and Fourteenth Amendments for a police officer, while standing beside a motor vehicle in the course of investigating a traffic infraction, to order a passenger out of the vehicle at gun point because of the officer's observation of an empty gun holster in plain view in the passenger compartment of the vehicle.
N.Y.—*People v. Livigni*, 88 A.D.2d 386, 453 N.Y.S.2d 708 (2d Dep't 1982), order aff'd, 58 N.Y.2d 894, 460 N.Y.S.2d 530, 447 N.E.2d 78 (1983).
- 3 U.S.—*Cardwell v. Lewis*, 417 U.S. 583, 94 S. Ct. 2464, 41 L. Ed. 2d 325 (1974).
- 4 U.S.—*Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973).
Due process rights not violated
Due process rights of a defendant convicted of various drug trafficking offenses were not violated by the stop of an automobile in which he was a passenger or by search and seizure resulting therefrom; there was probable cause to stop the automobile in that the driver was speeding, a state trooper obtained permission from the driver to search the trunk of the car where drugs were initially found, and a subsequent inventory search of the car was properly conducted.
U.S.—*U.S. v. Lewis*, 922 F. Supp. 1514 (D. Kan. 1996), aff'd, 113 F.3d 1247 (10th Cir. 1997).
- 5 U.S.—*U.S. v. Collins*, 407 F. Supp. 1096 (D.N.D. 1976), judgment aff'd, 549 F.2d 557 (8th Cir. 1977).
- 6 Ga.—*Hall v. State*, 239 Ga. 832, 238 S.E.2d 912 (1977).
- 7 U.S.—*County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998); *Meals v. City of Memphis, Tenn.*, 493 F.3d 720, 2007 FED App. 0258P (6th Cir. 2007); *Ellis ex rel. Estate of Ellis v. Ogden City*, 589 F.3d 1099 (10th Cir. 2009).
Purpose to harm required to establish liability
U.S.—*Campbell v. Bastin*, 998 F. Supp. 2d 572 (E.D. Ky. 2014); *Customers Bank v. Municipality of Norristown*, 942 F. Supp. 2d 534 (E.D. Pa. 2013), aff'd, 563 Fed. Appx. 201 (3d Cir. 2014).

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16C C.J.S. Constitutional Law § 1627

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

B. Validity of Searches and Seizures

§ 1627. Constitutional rights pertaining to the seizure of allegedly obscene materials

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 3854, 4460, 4461

The seizure of instruments of crime, or contraband, or stolen goods, or objects dangerous in themselves is to be distinguished from quantities of books and movies when a court appraises the reasonableness of the seizure under due process standards.

The seizure of instruments of crime, or contraband, or stolen goods, or objects dangerous in themselves is to be distinguished from quantities of books and movies when a court appraises the reasonableness of the seizure under due process standards.¹ Generally, therefore, due process requires an adversary hearing on the question of obscenity before the seizure of allegedly obscene materials, such as buttons and posters,² magazines,³ or motion picture films,⁴ which are presumptively protected by the First Amendment,⁵ and a denial of that right requires restoration of the materials to the owner.⁶ Furthermore, in addition to a prompt pretrial adversary hearing on the issue of probable cause, due process entitles the owner of the seized materials to a final judicial determination on the issue of obscenity within a reasonable time after the seizure.⁷

On the other hand, it has been found that seizures made in connection with the enforcement of an ordinance relating to the sales distribution of "adult" books and films do not deny due process, where such seizures occur only after a warrant is issued by a magistrate who has viewed the films, and there is no indication that a request has been made for an adversary hearing.⁸

Seizure of projectors.

Where although motion picture projectors allegedly used to exhibit obscene films might have been used in the commission of a misdemeanor, they are designed for and capable of use for lawful purposes, and the alleged guilt of the owner has not been judicially determined, the projectors are not contraband and the seizure is unconstitutional as the taking of property without due process.⁹

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Footnotes

- 1 U.S.—[Roaden v. Kentucky](#), 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973).
Del.—[Gottlieb v. State](#), 406 A.2d 270 (Del. 1979).
 - 2 U.S.—[Leslie Tobin Imports, Inc. v. Rizzo](#), 305 F. Supp. 1135 (E.D. Pa. 1969).
 - 3 U.S.—[City News Center, Inc. v. Carson](#), 310 F. Supp. 1018 (M.D. Fla. 1970).
 - 4 U.S.—[Tyrone, Inc. v. Wilkinson](#), 410 F.2d 639 (4th Cir. 1969).
N.Y.—[People v. Hall](#), 63 Misc. 2d 127, 310 N.Y.S.2d 554 (Dist. Ct. 1970).
 - 5 Cal.—[People v. Superior Court](#), 28 Cal. App. 3d 600, 104 Cal. Rptr. 876 (4th Dist. 1972).
As to First Amendment guaranties and rights protected thereunder, generally, see §§ 735 et seq.
 - 6 Cal.—[People v. Superior Court](#), 28 Cal. App. 3d 600, 104 Cal. Rptr. 876 (4th Dist. 1972).
As to due process in connection with the retention of seized property, generally, see § 1622.
 - 7 Cal.—[People v. Superior Court](#), 28 Cal. App. 3d 600, 104 Cal. Rptr. 876 (4th Dist. 1972).
 - 8 U.S.—[Fort Eustis Books, Inc. v. Beale](#), 478 F. Supp. 1170 (E.D. Va. 1979).
 - 9 Cal.—[Porno, Inc. v. Municipal Court](#), 33 Cal. App. 3d 122, 108 Cal. Rptr. 797 (2d Dist. 1973).
- Statutory provision invalid**
A penal law provision permitting seizure of not only allegedly obscene films, but also equipment such as projectors vital to any operation of a theatre business, without the benefit of a prior adversary proceeding and with no provision for the conduct of such hearing promptly following the seizure, violated due process.
N.Y.—[Plaza Development Corp. v. Vogt](#), 52 A.D.2d 396, 384 N.Y.S.2d 67 (3d Dep't 1976).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

C. Preliminary Proceedings; Arrest or Detention; Bail; Summary Trial

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A.L.R. Library

A.L.R. Index, Arrests

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A.L.R. Index, Constitutional Law

A.L.R. Index, Criminal Law

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16C C.J.S. Constitutional Law § 1628

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

C. Preliminary Proceedings; Arrest or Detention; Bail; Summary Trial

§ 1628. Constitutional rights with respect to preliminary complaints and warrants

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4530 to 4532, 4569

Due process in criminal prosecutions requires that an accused be informed of the nature and cause of the accusation; generally, it is essential that a formal complaint under oath be filed against the accused.

Service of process in criminal prosecutions is governed by the principle of due process,¹ which requires that an accused be informed of the nature and cause of the accusation.² It is generally essential that a formal complaint under oath be filed against the accused³ and that such complaint run against him or her in particular and contain a charge of the substantive facts necessary to constitute an offense.⁴ It has also been found, however, that the filing of such a complaint is not necessary to due process of law in the trial of petty offenses under municipal ordinances.⁵ Thus, due process does not require a citation to set out the penalty which will follow in the event of a conviction.⁶

The failure to furnish a copy of an amended complaint to an accused, who has received a copy of the original complaint, violates the defendant's due process rights;⁷ the trial judge's subsequent in-court discussion with the defendant concerning the nature of the charge against him or her cannot compensate for such constitutional violation.⁸ Furthermore, the issuance of a summons

instead of a warrant, as authorized by statute or rules of criminal procedure, constitutes no violation of the rights of the accused under the Due Process Clause.⁹

Bench warrant.

The exercise of a prosecutor's discretionary power to utilize the bench warrant procedure and thereby deprive an accused of a probable cause hearing does not deny due process and neither does the issuance of a bench warrant at a hearing in which neither the accused nor his or her counsel are present.¹⁰

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Footnotes

- 1 Mass.—*Com. v. Beneficial Finance Co.*, 360 Mass. 188, 275 N.E.2d 33, 52 A.L.R.3d 1143 (1971).
- 2 Iowa—*Committee on Professional Ethics and Conduct of State Bar Ass'n v. Behnke*, 276 N.W.2d 838 (Iowa 1979).
- 3 Ala.—*Arzumanian v. City of Birmingham*, 165 Ala. 374, 51 So. 645 (1910).
Okla.—*De Graff v. State*, 1909 OK CR 82, 2 Okla. Crim. 519, 103 P. 538 (1909) (holding modified on other grounds by, *Kimbrell v. State*, 1912 OK CR 181, 7 Okla. Crim. 354, 123 P. 1027 (1912)).
- 4 Ala.—*Pinson v. City of Birmingham*, 24 Ala. App. 482, 136 So. 868 (1931).
Complaint sufficient to afford due process
N.Y.—*People ex rel. Grice v. Wright*, 60 Misc. 2d 488, 301 N.Y.S.2d 706 (County Ct. 1969).
R.I.—*State v. Drew*, 112 R.I. 129, 308 A.2d 516 (1973).
Complaint denied due process
Cal.—*Sallas v. Municipal Court*, 86 Cal. App. 3d 737, 150 Cal. Rptr. 543 (1st Dist. 1978).
Failure to state time to appear
The failure of a citation to contain a time within which the subject of the citation must appear as required by statute and the due process principles embodied therein renders the citation void ab initio.
W. Va.—*State v. Gaskins*, 210 W. Va. 580, 558 S.E.2d 579 (2001).
- 5 Ga.—*Pearson v. Wimbish*, 124 Ga. 701, 52 S.E. 751 (1906).
Docket entry sufficient to put accused on notice of offense
Fla.—*Wright v. Worth*, 83 Fla. 204, 91 So. 87 (1922).
- 6 Wyo.—*Department of Revenue and Taxation, Motor Vehicle Division v. Shipley*, 579 P.2d 415 (Wyo. 1978).
- 7 Wash.—*State v. Carr*, 97 Wash. 2d 436, 645 P.2d 1098 (1982).
- 8 Wash.—*State v. Carr*, 97 Wash. 2d 436, 645 P.2d 1098 (1982).
Uniform traffic ticket
The absence of a police officer's signature on a uniform traffic ticket at the time of its issuance is an amendable defect and does not render the ticket invalid; in most cases, any danger of unfounded prosecution posed by an unsigned ticket can be eliminated by an amendment, and therefore, no principled reason exists for adopting a per se rule that an unsigned traffic ticket is null and void.
N.J.—*State v. Fisher*, 180 N.J. 462, 852 A.2d 1074 (2004).
- 9 U.S.—*U.S. v. De Hardit*, 120 F. Supp. 110 (E.D. Va. 1954).
Va.—*Tate v. Lamb*, 195 Va. 1005, 81 S.E.2d 743 (1954).
- 10 Conn.—*State v. Townsend*, 167 Conn. 539, 356 A.2d 125 (1975).

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16C C.J.S. Constitutional Law § 1629

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

C. Preliminary Proceedings; Arrest or Detention; Bail; Summary Trial

§ 1629. Constitutional rights with respect to arrest or detention

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4530 to 4532, 4534 to 4552, 4701

An arrest must comport with the principles of due process, and an arrest without probable cause is a denial of due process.

An arrest must comport with the principles of due process,¹ which assures the right to be at liberty and to be imprisoned only for cause.² An arrest without probable cause,³ therefore, or an arrest or imprisonment, except as allowed or required by law, is a denial of due process.⁴

An arrest without the prior requirement of a verified arrest warrant may be violative of due process,⁵ though an individual who is arrested and taken into custody pursuant to a facially valid arrest warrant, without making any protest of innocence, is not deprived of a right to due process he or she might have otherwise enjoyed.⁶ Federal standards applicable to federal arrest warrants are binding upon the states by virtue of the Fourteenth Amendment,⁷ and the same standards apply under due process whether a warrant for an arrest or for a search is being considered.⁸ Additional and more stringent restrictions governing arrests adopted by the State, however, are not assimilated into federal due process and do not devolve a duty of enforcement on federal courts.⁹

The issuance of an arrest warrant by a nonattorney magistrate¹⁰ or clerk of court¹¹ does not violate due process. Furthermore, a warrant for the arrest of a defendant issued by the court upon an information issued by the state's attorney upon his or her oath of office does not deny a defendant due process of law.¹² The testimony of an administrator as to the cause on which an administrative arrest warrant has been issued satisfies the principles of due process;¹³ a statement of cause on which the warrant has been issued need not be appended to such a warrant.¹⁴ Where no timely objection is made at the trial, a defendant's due process rights are not denied by the fact that he or she has been arrested on a charge pursuant to a bench warrant issued on an application unsupported by oath or affirmation.¹⁵ Moreover, the due process of law clause of the Fifth Amendment to the Federal Constitution is not violated by an arrest, on a bench warrant issued on a federal indictment, of a person on bail to answer another indictment in a court of a coordinate jurisdiction.¹⁶

The constitutional guaranty of due process demands that a person not be arrested on the mere belief of a person that a crime has been committed by him or her.¹⁷ Due process requires that arrest warrants issue only after an independent determination of probable cause is made by a neutral judicial officer.¹⁸ It further requires that an officer first knock and announce his or her identity and purpose and wait a reasonable period before breaking into and entering the premises to execute an arrest warrant¹⁹ and prohibits police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony-arrest.²⁰

On the other hand, statutes authorizing an arrest without a warrant in certain cases do not deprive the person arrested of liberty without due process of law.²¹ Accordingly, an arrest without a warrant is valid under the Due Process Clause provided it is based on probable cause that the person arrested is committing or has committed an offense.²² Where a warrant has been properly issued, an arrest is constitutional, even if the officer who has sought the warrant has acted maliciously.²³ An illegal arrest does not necessarily amount to a denial of due process²⁴ and does not render a subsequent trial constitutionally invalid.²⁵ Furthermore, the Due Process Clause does not guarantee the dismissal of pending charges in cases which involve a violation of a defendant's right not to be detained without due process.²⁶

A stop, and thus a seizure of a person, for purposes of due process, occurs the moment the person's freedom to walk away from a police officer is restrained even though the restraint falls short of an arrest.²⁷ A detention prior to an arrest may be consistent with due process even if done without probable cause,²⁸ and the mere questioning of a suspect in the custody of officers is not a denial of due process.²⁹ In this connection, a person or vehicle may be detained for further investigation by a law enforcement officer without a warrant and without probable cause to believe a crime has been committed if the officer has a reasonable suspicion, that can be articulated, that a crime is being committed;³⁰ the detention must not be unreasonable in length and the investigation must be reasonable.³¹ However, detaining a defendant who has not yet been charged for any period longer than reasonably necessary for the state to decide whether to release him or her or to make a formal complaint violates due process.³²

The Due Process Clause shields the individual from false arrest and false imprisonment,³³ but the United States Constitution does not guarantee that only the guilty will be arrested.³⁴ Furthermore, it is no part of the policy underlying the constitutional guaranty of due process to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals.³⁵

Persons under arrest have the right not to be deprived of their personal security except in accord with due process of law.³⁶ When the State takes a person into its custody and holds him or her there against his or her will, the Due Process Clause imposes upon it a corresponding duty to assume some responsibility for that person's safety and general well-being.³⁷ The due process standard applicable to pretrial detainees applies to a person who is in the process of being arrested,³⁸ and the use of an excessive and unreasonable amount of force by law enforcement officers in effectuating an arrest is a violation of the victim's

right to due process of law.³⁹ On the other hand, in effecting an arrest, force found to be reasonable or not excessive under the circumstances is deemed to be in conformity with, and not in contravention of, due process of law.⁴⁰ The Due Process Clause requires the responsible government or governmental agency to provide medical care to persons who have been injured while being apprehended by the police.⁴¹

Holding person incommunicado.

Holding an accused incommunicado may be found to be a denial of due process, such as where the police prohibit drivers who refuse to take breathalyzer tests from obtaining independent blood tests for the purpose of establishing their sobriety.⁴² On the other hand, circumstances whereby an accused is held incommunicado may not amount to a denial of due process, such as when, at least when the police have good reason, they deny a person arrested for driving while intoxicated access to a telephone, and the arrestee rejects an offer to call anyone on his or her behalf.⁴³

Fingerprinting and photographing arrested persons.

Although it has been found that the exercise by sheriffs and other peace officers of their power to fingerprint persons in their custody suspected or accused of crimes is not an invasion of any constitutional or natural right of such persons⁴⁴ and that statutes providing for fingerprinting and photographing persons arrested do not deprive them of due process of law,⁴⁵ there is authority to the effect that a statute which by implication commands that all persons charged with certain offenses will forthwith, on arrest, be submitted to fingerprinting is an unlawful encroachment on the liberty of the person in violation of state and federal constitutional provisions.⁴⁶

Expungement or retention of arrest records.

The right to seek expungement of arrest records has been found to be an adjunct to due process,⁴⁷ though it has also been found that, absent legislation stating otherwise, there is no basis upon which the retention or authorized use of valid arrest records can be said to violate an arrestee's due process rights so as to entitle him or her to the expunction of such records.⁴⁸ Also, a statute governing petitions for the expungement of arrest records does not implicate a petitioner's right to procedural due process under the state constitution.⁴⁹

CUMULATIVE SUPPLEMENT

Cases:

Arrestees' claim that police officer's and prosecutor's failure to withdraw arrest warrants after learning that fraud charges against them were erroneous constituted an unconstitutional arrest did not allege deprivation of any right guaranteed under the Due Process Clause, since Fourth Amendment provided actionable ground for relief from unreasonable arrest, and defined process due to arrestees. [U.S. Const. Amends. 4, 14](#). [Safar v. Tingle](#), 859 F.3d 241 (4th Cir. 2017).

Police officer was not deliberately indifferent to serious medical needs of suspect who had been shot seven times, and thus did not violate suspect's due process rights, when officer called an ambulance, left to put his canine in police vehicle, and returned to render first aid, where other officers were present at scene and they began to render first aid while waiting for the ambulance. [U.S.C.A. Const. Amend. 14](#). [Mason v. Lafayette City-Parish Consol. Government](#), 806 F.3d 268 (5th Cir. 2015).

Police officers sought sufficiently prompt medical care after suspect was shot by officers, as required to comply with due process, where it was undisputed that officers called emergency medical services less than a minute after suspect was shot. [U.S. Const. Amend. 14. *Smith v. Kilgore*, 926 F.3d 479 \(8th Cir. 2019\).](#)

Police officer who requested canine unit to track and locate suspect, accompanied canine officer and police dog on search of suspect in dark, wooded area, and told canine officer that suspect could be armed with a knife, did not actively participate in the application of allegedly-excessive force, and thus could not be held liable on suspect's § 1983 claim alleging that use of police dog constituted excessive force in violation of Fourth Amendment; officer did not know anything about police dog or his propensity to bite, had no reason to believe that information about knife would lead dog to bite suspect or would increase chance that dog would do so, and did not participate in canine officer's decision to allow police dog to maintain bite on suspect for approximately one minute. [U.S. Const. Amend. 4; 42 U.S.C.A. § 1983. *Miller v. Rybicki*, 259 F. Supp. 3d 688 \(E.D. Mich. 2017\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1

[Ariz.—*Erickson v. City Court of City of Phoenix*, 105 Ariz. 19, 458 P.2d 953 \(1969\).](#)
[Del.—*State v. Lynch*, 274 A.2d 443 \(Del. Super. Ct. 1971\).](#)
Advising arrestee of charges
 Where persons taken into custody during demonstrations were told by police that they were under arrest and, if they asked, were informed that they were charged with disorderly conduct, there was no violation of due process on the ground that the statement of charges was not sufficiently specific, that is, whether the arrest was for a violation of the failure-to-move-on statute or a violation of the order issued under police line regulations.
[U.S.—*Washington Mobilization Committee v. Cullinane*, 566 F.2d 107 \(D.C. Cir. 1977\).](#)
Abduction from foreign country
 The circumstances of the defendant's arrest under which Central Intelligence Agency (CIA) agents allegedly enticed him by deceitful means upon a private airplane to leave Bimini, made him lie on the floor at gunpoint, twisted his arm when he deplaned, and took him to Federal Bureau of Investigation (FBI) agents did not constitute a violation of due process.
[U.S.—*U.S. v. Reed*, 639 F.2d 896, 7 Fed. R. Evid. Serv. 918, 64 A.L.R. Fed. 276 \(2d Cir. 1981\).](#)
- 2

[U.S.—*Dye v. Cox*, 125 F. Supp. 714 \(E.D. Va. 1954\).](#)
Valid warrant
 A suspect who is jailed pursuant to a valid warrant has no claim under the Fourteenth Amendment that he or she is deprived of his or her liberty without due process.
[Mont.—*Ronek v. Gallatin County*, 227 Mont. 514, 740 P.2d 1115 \(1987\).](#)
- 3

[U.S.—*Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 \(1972\); *Marksmeier v. Davie*, 622 F.3d 896 \(8th Cir. 2010\).](#)
[Nev.—*Watson v. Sheriff, Lyon County*, 93 Nev. 403, 566 P.2d 416 \(1977\).](#)
[N.Y.—*People v. Wharton*, 60 A.D.2d 291, 400 N.Y.S.2d 840 \(2d Dep't 1977\), judgment aff'd, 46 N.Y.2d 924, 415 N.Y.S.2d 204, 388 N.E.2d 341 \(1979\).](#)
[Wis.—*State v. Paszek*, 50 Wis. 2d 619, 184 N.W.2d 836 \(1971\).](#)
Arrest without probable cause in bad faith
[U.S.—*Harris v. County of Nassau*, 581 F. Supp. 2d 351 \(E.D. N.Y. 2008\); *Cooper v. City of New Rochelle*, 925 F. Supp. 2d 588 \(S.D. N.Y. 2013\).](#)
- 4

[Conn.—*State v. Lamme*, 216 Conn. 172, 579 A.2d 484 \(1990\).](#)
Arrest based on inaccurate information
 An arrest based solely on National Crime Information Center information which was inaccurate when relayed to the state arresting officers and which had been so for five months constituted a denial of due process of law.

U.S.—*U.S. v. Mackey*, 387 F. Supp. 1121 (D. Nev. 1975).

Substantive due process rights for purposes of § 1983 action

An arrestee's incarceration following his or her arrest pursuant to a warrant subsequently found to have been obtained without probable cause does not violate his or her substantive due process rights, sufficient to support a § 1983 action.

U.S.—*Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994).

Ala.—*Jim Walter Resources, Inc. v. Local Union No. 12014*, 356 So. 2d 640 (Ala. 1978).

Iowa—*Christenson v. Ramaeker*, 366 N.W.2d 905 (Iowa 1985).

U.S.—*U.S. v. Melvin*, 258 F. Supp. 252 (S.D. Fla. 1966).

Conn.—*State v. Jackson*, 162 Conn. 440, 294 A.2d 517 (1972).

Probable cause standards

N.M.—*State v. Gorsuch*, 87 N.M. 135, 1974-NMCA-143, 529 P.2d 1256 (Ct. App. 1974).

U.S.—*Gabriel v. U.S.*, 366 F.2d 726 (9th Cir. 1966).

Conn.—*State v. Jackson*, 162 Conn. 440, 294 A.2d 517 (1972).

As to the application of due process to searches and seizures, see § 1622.

U.S.—*Wessling v. Bennett*, 290 F. Supp. 511 (N.D. Iowa 1968), judgment aff'd, 410 F.2d 205 (8th Cir. 1969).

Mich.—*People v. Delongchamps*, 103 Mich. App. 151, 302 N.W.2d 626 (1981).

Fla.—*Shadwick v. City of Tampa*, 250 So. 2d 4 (Fla. 1971), judgment aff'd, 407 U.S. 345, 92 S. Ct. 2119, 32 L. Ed. 2d 783 (1972).

Vt.—*Woodmansee v. Smith*, 130 Vt. 383, 296 A.2d 182 (1972).

Vt.—*State v. Pecor*, 127 Vt. 401, 250 A.2d 736 (1969).

Cal.—*People v. Anderson*, 49 Cal. App. 3d 869, 123 Cal. Rptr. 209 (4th Dist. 1975).

Cal.—*People v. Anderson*, 49 Cal. App. 3d 869, 123 Cal. Rptr. 209 (4th Dist. 1975).

Conn.—*D'Amico v. Reincke*, 155 Conn. 627, 236 A.2d 914 (1967).

U.S.—*Morse v. U.S.*, 267 U.S. 80, 45 S. Ct. 209, 69 L. Ed. 522 (1925).

N.Y.—*People ex rel. Eiseman v. Sheriff of Oneida County*, 55 Misc. 2d 685, 285 N.Y.S.2d 950 (County Ct. 1967), order aff'd, 30 A.D.2d 644, 291 N.Y.S.2d 780 (4th Dep't 1968).

Cal.—*People v. Donovan*, 272 Cal. App. 2d 413, 77 Cal. Rptr. 285 (2d Dist. 1969).

Me.—*State v. Bleyl*, 435 A.2d 1349 (Me. 1981).

Mich.—*People v. Heard*, 19 Mich. App. 516, 172 N.W.2d 889 (1969).

Complaint

Where the actual basis for a complainant's conclusion in a complaint for an arrest warrant was information from an unnamed informant with other operative facts omitted, without facts to show the credibility of the informant or the reliability of his information, the complaint did not support a finding of probable cause by an issuing magistrate and the arrest under the warrant violated constitutional rights under the Fourteenth Amendment.

Md.—*Collins v. State*, 17 Md. App. 376, 302 A.2d 693 (1973).

R.I.—*State v. Sundel*, 121 R.I. 638, 402 A.2d 585 (1979).

U.S.—*Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

S.C.—*State v. Quinn*, 111 S.C. 174, 97 S.E. 62, 3 A.L.R. 1500 (1918).

U.S.—*U.S. v. Margeson*, 259 F. Supp. 256 (E.D. Pa. 1966).

Mich.—*People v. Owens*, 3 Mich. App. 707, 143 N.W.2d 574 (1966).

U.S.—*Jureczki v. City of Seabrook, Tex.*, 760 F.2d 666 (5th Cir. 1985).

U.S.—*Moore v. Beto*, 320 F. Supp. 469 (S.D. Tex. 1970).

Ind.—*Walker v. State*, 261 Ind. 519, 307 N.E.2d 62 (1974).

Ohio—*State v. Fairbanks*, 32 Ohio St. 2d 34, 61 Ohio Op. 2d 241, 289 N.E.2d 352 (1972).

Arrest not shocking and outrageous

Assuming that the arrest of a felony-murder defendant was illegally based upon an identification made after the crime was described and the defendant's picture was shown on a television program, the arrest was not shocking and outrageous so as to violate the defendant's due process rights.

Ga.—*Jenkins v. State*, 260 Ga. 231, 391 S.E.2d 397 (1990).

U.S.—*Green v. State of Me.*, 113 F. Supp. 253 (D. Me. 1953).

Pa.—*Com. ex rel. Garrison v. Burke*, 378 Pa. 344, 106 A.2d 587 (1954).

As to requiring one forcibly removed from another state without the formality of extradition to face criminal charges in the state to which he or she is returned as not constituting a denial of due process, see § 1619.

26 N.H.—*In re Vernon E.*, 121 N.H. 836, 435 A.2d 833 (1981).

N.M.—*State v. Smallwood*, 94 N.M. 225, 1980-NMCA-037, 608 P.2d 537 (Ct. App. 1980).

27 U.S.—*Dunaway v. New York*, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979).

Ill.—*People v. Kennedy*, 66 Ill. App. 3d 267, 22 Ill. Dec. 905, 383 N.E.2d 713 (5th Dist. 1978).

Standard of probable cause

Where the police did not have probable cause to arrest a youth at the time of his seizure, as implicitly recognized by the police themselves in taking the youth to the home of the complainant for a show-up, the detention of the youth, being based on less than probable cause, violated due process.

N.Y.—*Matter of Martin S.*, 104 Misc. 2d 1036, 429 N.Y.S.2d 1009 (Fam. Ct. 1980).

28 Ariz.—*Long v. Garrett*, 22 Ariz. App. 397, 527 P.2d 1240 (Div. 2 1974).

29 Cal.—*People v. Millum*, 42 Cal. 2d 524, 267 P.2d 1039 (1954).

30 N.C.—*State v. Trapper*, 48 N.C. App. 481, 269 S.E.2d 680 (1980).

Officer's reasonable conclusion that criminal activity is afoot

The Fourth Amendment, applicable to the states through the Fourteenth Amendment, permits police officers to briefly stop an individual if the officer observes unusual conduct which leads him or her reasonably to conclude in light of his or her experience that criminal activity may be afoot.

Mo.—*State v. Cunningham*, 193 S.W.3d 774 (Mo. Ct. App. S.D. 2006).

As to a vehicle stop and the detention of the occupants, and the search and seizure of a vehicle under the due process guaranty, generally, see § 1626.

31 N.C.—*State v. Trapper*, 48 N.C. App. 481, 269 S.E.2d 680 (1980).

32 Wis.—*State v. Benoit*, 83 Wis. 2d 389, 265 N.W.2d 298 (1978).

33 U.S.—*Canty v. City of Richmond, Virginia, Police Dept.*, 383 F. Supp. 1396 (E.D. Va. 1974), *aff'd*, 526 F.2d 587 (4th Cir. 1975).

34 U.S.—*Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979).

Misrepresentation to state's attorney

The constitution does not require an arresting officer to make an error-free investigation of all claims of innocence, but if an officer undertakes to make decisions which are not his or hers to make and then intentionally misleads an assistant state's attorney who does have ultimate authority to authorize an arrest, the officer may be found to have deprived the arrestee of his or her liberty without due process.

U.S.—*Whitley v. Seibel*, 613 F.2d 682 (7th Cir. 1980).

35 Or.—*State v. Frame*, 45 Or. App. 723, 609 P.2d 830 (1980).

36 U.S.—*Lynch v. U.S.*, 189 F.2d 476 (5th Cir. 1951).

37 U.S.—*Wheeler v. City of Philadelphia*, 367 F. Supp. 2d 737 (E.D. Pa. 2005).

Reasonable steps to protect safety of person in custody required

U.S.—*Bennett v. City of Yonkers*, 859 F. Supp. 92 (S.D. N.Y. 1994).

38 U.S.—*Henderson v. Counts*, 544 F. Supp. 149 (E.D. Va. 1982).

As to pretrial detainees, generally, see § 1631.

39 U.S.—*U.S. v. Stokes*, 506 F.2d 771 (5th Cir. 1975); *McLeod-Lopez v. Algarin*, 603 F. Supp. 2d 330 (D.P.R. 2009); *Malpass v. Gibson*, 685 F. Supp. 2d 573 (D.S.C. 2010).

Force not excessive

Pa.—*Com. v. Epps*, 270 Pa. Super. 295, 411 A.2d 534 (1979).

Excessive force claim

(1) A claim of the excessive use of force arising during an arrest is grounded in the Fourth Amendment protection against unreasonable seizures as applied to the states by the Fourteenth Amendment.

Wis.—*Robinson v. City of West Allis*, 2000 WI 126, 239 Wis. 2d 595, 619 N.W.2d 692 (2000).

(2) Even if an officer's use of force could be justified after the fact by a legitimate objective, such as effectuating arrest, he or she can still be held liable for a due process violation if he or she used force for an illegitimate purpose.

U.S.—*A.D. v. California Highway Patrol*, 712 F.3d 446 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 531, 187 L. Ed. 2d 394 (2013).

40 U.S.—*Samuel v. Busnuck*, 423 F. Supp. 99 (D. Md. 1976).

Minn.—*Schumann v. City of St. Paul*, 268 N.W.2d 903 (Minn. 1978).

- 41 U.S.—*City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983); *Valderrama v. Rousseau*, 780 F.3d 1108 (11th Cir. 2015); *Barbosa v. Conlon*, 962 F. Supp. 2d 316 (D. Mass. 2013); *Garcia v. Dutchess County*, 43 F. Supp. 3d 281 (S.D. N.Y. 2014), *aff'd* in part, dismissed in part, 2015 WL 2215312 (2d Cir. 2015).
- Neb.—*Lutheran Medical Center v. City of Omaha*, 229 Neb. 802, 429 N.W.2d 347 (1988).
- 42 Ariz.—*Smith v. Cada*, 114 Ariz. 510, 562 P.2d 390 (Ct. App. Div. 1 1977).
- As to the denial of the right to obtain evidence regarding a blood test, generally, see § 1693.
- 43 U.S.—*Scarborough v. Kellum*, 525 F.2d 931 (5th Cir. 1976).
- 44 Ark.—*Shannon v. State*, 207 Ark. 658, 182 S.W.2d 384 (1944).
- 45 Idaho—*Voyles v. City of Nampa*, 97 Idaho 597, 548 P.2d 1217 (1976).
- Ind.—*Voelker v. Tyndall*, 226 Ind. 43, 75 N.E.2d 548 (1947).
- 46 N.Y.—*People v. Hevern*, 127 Misc. 141, 215 N.Y.S. 412 (Magis. Ct. 1926).
- 47 Pa.—*Com. v. Hughes*, 295 Pa. Super. 304, 441 A.2d 1244 (1982).
- Nolle prosequi**
- Where an accused is indicted and never tried because the indictments were nol prossed upon the district attorney's confession that he or she would be unable to establish a prima facie case at trial, due process requires the Commonwealth to present compelling evidence justifying the retention of an arrest record.
- Pa.—*Edward M. v. O'Neill*, 291 Pa. Super. 531, 436 A.2d 628 (1981).
- 48 N.D.—*State v. Howe*, 308 N.W.2d 743 (N.D. 1981).
- 49 Mo.—*In re Dyer*, 163 S.W.3d 915 (Mo. 2005).

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16C C.J.S. Constitutional Law § 1630

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

C. Preliminary Proceedings; Arrest or Detention; Bail; Summary Trial

§ 1630. Constitutional rights with respect to arrest or detention—Prearrest delay

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4530 to 4532, 4534 to 4552, 4701

A mere delay between the time of the commission of an offense and the arrest therefor is not ordinarily a denial of due process, but under some circumstances, such a delay may constitute a due process violation.

The statute of limitations is usually considered the primary guarantee against overly stale criminal charges, but the right of due process provides additional protection, safeguarding a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence.¹

Generally, due process considerations apply to a prearrest delay.² While a mere delay between the time of the commission of an offense and arrest therefor is not ordinarily a denial of due process,³ under some circumstances, such a delay may constitute a due process violation.⁴ Due process requires that an arrest be made within a reasonable time after the police have completed their investigation⁵ though a prearrest due process deprivation cannot be quantified into a specific number of days.⁶ Many factors must be taken into consideration,⁷ such as the length of the delay,⁸ the reason for the delay,⁹ prejudice which the delay may have caused,¹⁰ and whether the delay has been purposeful and intended to prejudice the defendant.¹¹

The resolution of a due process claim requires a balancing of the reasonableness of the delay against the prejudice to the accused,¹² and the reasonableness is to be determined on the facts of each particular case.¹³ Thus, an unreasonable delay between the commission of the offense and the arrest may violate a defendant's constitutional rights if the delay results in prejudice to the defendant,¹⁴ and the purpose is to gain tactical advantage over him or her.¹⁵

However, the possibility of prejudice, without more, is insufficient to make a due process claim.¹⁶ A determination made in good faith to delay prosecution for sufficient reasons will not deprive a defendant of due process even though there may be some prejudice to the defendant.¹⁷ Furthermore, proof of actual prejudice does not make valid a due process assault on a delayed arrest but, rather, merely makes such a claim ripe for adjudication.¹⁸ For a prearrest delay to constitute a denial of due process, a defendant must show actual and substantial prejudice,¹⁹ and bad intent on the part of the government,²⁰ and the government must then be unable to show the reasonableness of the delay.²¹

A delay between the commission of an offense and the arrest therefor does not violate due process where it is shown by competent and material evidence that the delay is explainable, that it has not been deliberate, and that no undue prejudice has attached to the defendant.²² It is not appropriate to apply the factors of Sixth Amendment speedy trial rights in determining actual prejudice.²³

CUMULATIVE SUPPLEMENT

Cases:

As at the prearrest stage, due process serves as a backstop against exorbitant delay between conviction and sentencing. [U.S.C.A. Const.Amends. 5, 14](#). [Betterman v. Montana](#), 136 S. Ct. 1609 (2016).

[END OF SUPPLEMENT]

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Footnotes

- 1 Cal.—[People v. Jones](#), 57 Cal. 4th 899, 161 Cal. Rptr. 3d 295, 306 P.3d 1136 (2013), as modified on denial of reh'g, (Oct. 2, 2013) and cert. denied, 134 S. Ct. 1944, 188 L. Ed. 2d 967 (2014).
Due process plays limited role in protecting against oppressive delay
U.S.—[U.S. v. Jackson](#), 446 F.3d 847 (8th Cir. 2006).
- 2 U.S.—[U.S. v. Henry](#), 615 F.2d 1223 (9th Cir. 1980).
Wyo.—[Ortiz v. State](#), 2014 WY 60, 326 P.3d 883 (Wyo. 2014).
Versus right to speedy trial
Due process standards, not those encompassed by the Sixth Amendment right to a speedy trial, apply to delays in the investigative stage before either arrest or indictment of the accused.
Ga.—[Bunn v. State](#), 284 Ga. 410, 667 S.E.2d 605 (2008).
- 3 Conn.—[State v. Derks](#), 155 Conn. App. 87, 108 A.3d 1157 (2015), certification denied, 315 Conn. 930, 110 A.3d 432 (2015).
D.C.—[U. S. v. Donaldson](#), 451 A.2d 51 (D.C. 1982).
Ga.—[Roebuck v. State](#), 277 Ga. 200, 586 S.E.2d 651 (2003).
Mich.—[People v. Woolfolk](#), 304 Mich. App. 450, 848 N.W.2d 169 (2014).
Unjustified delay in prosecution
N.Y.—[People v. Decker](#), 13 N.Y.3d 12, 884 N.Y.S.2d 662, 912 N.E.2d 1041 (2009).
- 4 Cal.—[People v. Alexander](#), 49 Cal. 4th 846, 113 Cal. Rptr. 3d 190, 235 P.3d 873 (2010), as modified on denial of reh'g, (Sept. 29, 2010).

Ga.—[Wooten v. State](#), 262 Ga. 876, 426 S.E.2d 852 (1993).

Pa.—[Com. v. Snyder](#), 552 Pa. 44, 713 A.2d 596 (1998).

Nev.—[Wyman v. State](#), 125 Nev. 592, 217 P.3d 572 (2009).

N.Y.—[People v. Serafin](#), 67 Misc. 2d 193, 324 N.Y.S.2d 235 (County Ct. 1971).

Fla.—[State v. Griffin](#), 347 So. 2d 692 (Fla. 1st DCA 1977).

U.S.—[U.S. v. Williams](#), 352 F. Supp. 1387 (D.D.C. 1973).

Colo.—[People ex rel. Coca v. District Court of Seventh Judicial Dist.](#), 187 Colo. 280, 530 P.2d 958 (1975).

Fla.—[Shuman v. State](#), 347 So. 2d 696 (Fla. 1st DCA 1977).

U.S.—[U.S. v. Shaw](#), 555 F.2d 1295 (5th Cir. 1977).

Ga.—[Roebuck v. State](#), 277 Ga. 200, 586 S.E.2d 651 (2003).

Mont.—[State v. Cummins](#), 257 Mont. 491, 850 P.2d 952 (1993).

N.Y.—[People v. Lesiuk](#), 81 N.Y.2d 485, 600 N.Y.S.2d 931, 617 N.E.2d 1047 (1993).

Iowa—[State v. Williams](#), 574 N.W.2d 293 (Iowa 1998).

Pa.—[Com. v. Snyder](#), 552 Pa. 44, 713 A.2d 596 (1998).

Most critical factor

Tenn.—[State v. Gilley](#), 297 S.W.3d 739 (Tenn. Crim. App. 2008).

Unavailability of witnesses

Colo.—[People ex rel. Coca v. District Court of Seventh Judicial Dist.](#), 187 Colo. 280, 530 P.2d 958 (1975).

Colo.—[People ex rel. Coca v. District Court of Seventh Judicial Dist.](#), 187 Colo. 280, 530 P.2d 958 (1975).

Utah—[State v. Bailey](#), 712 P.2d 281 (Utah 1985).

Wis.—[State v. Wilson](#), 149 Wis. 2d 878, 440 N.W.2d 534 (1989).

Negligence

For purposes of determining whether prearrest delay violated defendant's right to due process, at least in the absence of severe prejudice to the defense, negligence, even gross negligence, on the part of the police is not enough to support a due process claim; at a minimum, it must be shown that the police deliberately sought to hinder the defense or acted recklessly in failing to arrest defendant in a timely manner.

D.C.—[Diggs v. U.S.](#), 28 A.3d 585 (D.C. 2011).

Cal.—[People v. Cowan](#), 50 Cal. 4th 401, 113 Cal. Rptr. 3d 850, 236 P.3d 1074 (2010).

Fla.—[State v. Stuart](#), 115 So. 3d 420 (Fla. 2d DCA 2013).

La.—[State v. Malvo](#), 357 So. 2d 1084 (La. 1978).

U.S.—[U.S. v. Morris](#), 308 F. Supp. 1348 (E.D. Pa. 1970).

Cal.—[People v. Wright](#), 2 Cal. App. 3d 732, 82 Cal. Rptr. 859 (2d Dist. 1969).

Violation of fundamental concepts of justice, decency, and fair play

For purposes of whether a delay in prosecution violates due process, the inquiry is whether the delay violated those fundamental conceptions of justice which lie at the base of civil and political institutions and which define the community's sense of fair play and decency.

U.S.—[U.S. v. Brown](#), 498 F.3d 523, 2007 FED App. 0321P (6th Cir. 2007).

Fla.—[State v. Hope](#), 89 So. 3d 1132 (Fla. 1st DCA 2012).

Idaho—[State v. Crockett](#), 151 Idaho 674, 263 P.3d 139 (Ct. App. 2011).

U.S.—[U.S. v. Parrott](#), 425 F.2d 972 (2d Cir. 1970).

Ga.—[Jackson v. State](#), 322 Ga. App. 196, 744 S.E.2d 380 (2013).

Idaho—[State v. Crockett](#), 151 Idaho 674, 263 P.3d 139 (Ct. App. 2011).

Extent of delay

Although not determinative, the extent of the delay in prosecution is of critical importance, in evaluating whether the defendant was deprived of due process by the delay because, all other factors being equal, the greater the delay, the more probable it is that the defendant will be harmed thereby.

N.Y.—[People v. Decker](#), 13 N.Y.3d 12, 884 N.Y.S.2d 662, 912 N.E.2d 1041 (2009).

Fla.—[State v. Stuart](#), 115 So. 3d 420 (Fla. 2d DCA 2013); [Jackson v. State](#), 322 Ga. App. 196, 744 S.E.2d 380 (2013).

Idaho—[State v. Crockett](#), 151 Idaho 674, 263 P.3d 139 (Ct. App. 2011).

U.S.—[U.S. v. Orbiz](#), 366 F. Supp. 624 (D.P.R. 1973).

N.D.—[State v. Weisz](#), 356 N.W.2d 462 (N.D. 1984).

No actual prejudice

U.S.—[U.S. v. McGough](#), 510 F.2d 598 (5th Cir. 1975).

- Iowa—*State v. Williams*, 574 N.W.2d 293 (Iowa 1998).
- Wis.—*State v. McGuire*, 2010 WI 91, 328 Wis. 2d 289, 786 N.W.2d 227 (2010).
- 17 U.S.—*Bierenbaum v. Graham*, 607 F.3d 36 (2d Cir. 2010).
- N.Y.—*People v. Decker*, 13 N.Y.3d 12, 884 N.Y.S.2d 662, 912 N.E.2d 1041 (2009).
- 18 Fla.—*Howell v. State*, 418 So. 2d 1164 (Fla. 1st DCA 1982).
- 19 D.C.—*U. S. v. Donaldson*, 451 A.2d 51 (D.C. 1982).
- Ill.—*People v. Totzke*, 2012 IL App (2d) 110823, 362 Ill. Dec. 887, 974 N.E.2d 408 (App. Ct. 2d Dist. 2012).
- Neb.—*State v. Hettle*, 288 Neb. 288, 848 N.W.2d 582 (2014).
- Mere speculation as to prejudice insufficient**
- Idaho—*State v. Crockett*, 151 Idaho 674, 263 P.3d 139 (Ct. App. 2011).
- Mich.—*People v. Woolfolk*, 304 Mich. App. 450, 848 N.W.2d 169 (2014).
- Prejudice resulting merely from passage of time insufficient**
- Ga.—*Jackson v. State*, 322 Ga. App. 196, 744 S.E.2d 380 (2013).
- Necessary but not sufficient proof**
- Proof of prejudice is a necessary, but generally not sufficient, element of the claim.
- U.S.—*U.S. v. Henry*, 615 F.2d 1223 (9th Cir. 1980).
- Material impairment of ability to prepare defense**
- Actual prejudice to the defendant from prearrest delay, as an element of establishing that the delay violated the Due Process Clause, is the material impairment of the defendant's ability to prepare a defense.
- Fla.—*State v. Stuart*, 115 So. 3d 420 (Fla. 2d DCA 2013).
- Loss of evidence or witnesses**
- On a motion to dismiss a charge on the ground of unjustified delay between the crimes and the arrest in violation of due process, prejudice may be shown by loss of material witnesses due to lapse of time or loss of evidence because of fading memory attributable to the delay.
- Cal.—*People v. Cowan*, 50 Cal. 4th 401, 113 Cal. Rptr. 3d 850, 236 P.3d 1074 (2010).
- 20 U.S.—*U.S. v. Terjeson*, 424 F. Supp. 16 (E.D. N.Y. 1976).
- Mich.—*People v. Bisard*, 114 Mich. App. 784, 319 N.W.2d 670 (1982).
- Improper motive or purpose**
- Wis.—*State v. McGuire*, 2010 WI 91, 328 Wis. 2d 289, 786 N.W.2d 227 (2010).
- Bad faith**
- Neb.—*State v. Hettle*, 288 Neb. 288, 848 N.W.2d 582 (2014).
- 21 Ill.—*People v. Ojeda*, 91 Ill. App. 3d 723, 47 Ill. Dec. 40, 414 N.E.2d 1156 (1st Dist. 1980).
- Pa.—*Com. v. Weiss*, 622 Pa. 663, 81 A.3d 767 (2013).
- Delay occasioned by ongoing investigation**
- Ga.—*Jackson v. State*, 322 Ga. App. 196, 744 S.E.2d 380 (2013).
- Delay justified by need to protect identity of confidential informant in ongoing investigation**
- Fla.—*State v. Stuart*, 115 So. 3d 420 (Fla. 2d DCA 2013).
- 22 Ill.—*People v. Holland*, 28 Ill. App. 3d 89, 327 N.E.2d 597 (2d Dist. 1975).
- N.Y.—*People v. Collins*, 66 Misc. 2d 340, 320 N.Y.S.2d 693 (County Ct. 1971).
- 23 Ga.—*Wooten v. State*, 262 Ga. 876, 426 S.E.2d 852 (1993).
- Md.—*State v. Gee*, 298 Md. 565, 471 A.2d 712 (1984).
- Wis.—*State v. Rogers*, 70 Wis. 2d 160, 233 N.W.2d 480 (1975).
- As to due process requiring a speedy trial, see § 1696.

16C C.J.S. Constitutional Law § 1631

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

C. Preliminary Proceedings; Arrest or Detention; Bail; Summary Trial

§ 1631. Constitutional rights with respect to arrest or detention—Pretrial detainees

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4530 to 4532, 4534 to 4552, 4701

It is not an improper invasion of personal liberty to arrest a person charged with a crime and keep him or her detained until trial, but a pretrial detainee is protected by the Due Process Clause.

It is not an improper invasion of personal liberty to arrest a person charged with a crime and keep him or her detained until trial.¹ A pretrial detainee is protected by the Due Process Clause,² however, and prison conditions which are unconstitutional for convicted persons under the Eighth Amendment prohibition against cruel and unusual punishment are likewise an abridgement of the due process guaranties afforded unconvicted persons³ though the rights of pretrial detainees are governed by the Due Process Clauses rather than by the Eighth Amendment.⁴ Procedural due process protections due to sentenced inmates thus provide a floor for what pretrial detainees may expect.⁵ In addition, pretrial detainees retain several constitutionally protected liberty interests relevant to the conditions of their confinement that are not fully available to sentenced inmates.⁶

The Due Process Clause requires that pretrial detainees not be punished.⁷ Thus, in evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate the protection against deprivation of liberty without due process, the proper inquiry is whether those conditions or restrictions amount to punishment of the detainee.⁸ In this connection, due process

vouchsafes to pretrial detainees the right to receive reasonable medical care,⁹ the right to access to physical exercise and recreation,¹⁰ the right to detention facilities providing ventilation, outside exposure, and decent hygiene, the right to access to materials for correspondence and pursuit of litigation, and the right to access to newspapers and the like.¹¹

However, neither loss of freedom and privacy nor interference with the desire to live as comfortably, and with as little restraint as possible, amounts to punishment.¹² Rather, the question is whether the disability is imposed to punish or is incident of some legitimate, governmental purpose and, absent an express intent to punish, the answer generally turns on whether an alternative purpose to which the restriction may rationally be connected is assignable for it and whether it appears excessive in relation to the assigned purpose.¹³ For pretrial detainees to prevail on claims that the conditions of confinement violate due process, they must prove that the defendants have acted with deliberate indifference to deprive them of the minimal civilized measure of life's necessities.¹⁴ "Deliberate indifference," in violation of due process, requires that the defendants knew of and disregarded a substantial risk of serious harm to a pretrial detainee's health and safety.¹⁵ Conduct that is merely negligent or grossly negligent does not implicate the protections afforded pretrial detainees by the Due Process Clause.¹⁶

Another view is that there must be a balancing of the harm to the individual resulting from the condition imposed against the benefits sought by the government through its enforcement.¹⁷ In any event, subjecting pretrial detainees to restrictions and privations other than those which inhere in their confinement itself or which are justified by compelling necessities of jail administration,¹⁸ or to restraints which are in excess of those reasonably related to the purpose and fact of their confinement, is a violation of due process.¹⁹

The legitimate governmental objectives of pretrial detention are to insure a detainee's presence at trial²⁰ and to maintain security and order in its detention facilities.²¹ Thus, any state action which restricts a protected liberty interest and which is not required either to maintain security as to all inmates,²² or to assure a particular inmate's presence at trial, violates the constitutional guaranty that no person will be deprived of liberty without due process of law.²³ What might otherwise be a lawful detention becomes an unconstitutional restriction when prison conditions become so dehumanizing as to constitute an additional hardship beyond the need for custody in violation of the detainees' due process rights.²⁴

In accordance with the foregoing principles, the constitutionality of various conditions or restrictions of pretrial detention, such as a jail's practice of conducting random, irregular shakedown searches of the pretrial detainees' cells,²⁵ the prohibition against pretrial detainees' receipt of packages of food and personal items from outside the institution,²⁶ understaffing practices,²⁷ the detainees' rights to assistance of counsel²⁸ and access to legal materials and facilities,²⁹ overcrowding practices,³⁰ and allegedly unhealthy and unsanitary conditions,³¹ including the failure to provide facilities and equipment for personal hygiene,³² and visitation arrangements have been adjudicated.³³

Duration of pretrial detention.

Overdetentions potentially violate the substantive component of the Due Process Clause by infringing upon an individual's basic liberty interest in being free from incarceration absent a criminal conviction.³⁴ The due process limit on the duration of pretrial detention requires an assessment on a case-by-case basis since due process does not necessarily set a bright-line limit for the length of the pretrial confinement.³⁵ In considering a due process challenge to pretrial detention, courts consider the strength of the evidence justifying detention, the government's responsibility for the delay in proceeding to trial, and the length of the detention itself,³⁶ as well as evidence concerning the danger to the safety of any other person or the community.³⁷

Procedural due process.

Pretrial detention implicates a liberty interest and requires a fair hearing within the mandates of procedural due process.³⁸ Accordingly, the first step in analyzing a due process claim by pretrial detainees is to determine whether they possess a liberty interest requiring procedural protection, and the second is to determine whether the procedures available are adequate.³⁹ The temporary loss of certain privileges, however, does not require a full-blown due process hearing.⁴⁰ Accordingly, a pretrial detention statute providing a procedure for detention hearings does not deny a defendant due process by establishing "clear and convincing" evidence as the standard of proof rather than the "reasonable doubt" standard or by denying a defendant the right to cross-examine witnesses who have alleged that he or she has threatened them.⁴¹

Because pretrial detainees have liberty interest in being free from punishment prior to conviction under Due Process Clause, a pretrial detainee is entitled to a due process hearing before prison officials may impose restraints on the detainee's liberty for disciplinary reasons.⁴²

Incompetents.

It is a continued confinement of a defendant beyond a reasonable period necessary to determine his or her lack of fitness to proceed in a criminal prosecution against him or her and the expected duration of any incapacity, not an initial commitment for the foregoing purpose upon a suggestion of mental incompetence, that violates precepts of due process.⁴³ The forced and involuntary rehabilitation of a pretrial detainee is included in the ban of punishment without due process.⁴⁴

CUMULATIVE SUPPLEMENT

Cases:

Mere fact that legal process has gone forward does not extinguish a detainee's Fourth Amendment claim or somehow convert that claim into one founded on the Due Process Clause. [U.S.C.A. Const.Amend. 4, 5; 42 U.S.C.A. § 1983. Manuel v. City of Joliet, Ill., 137 S. Ct. 911 \(2017\).](#)

Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process; abrogating [Newsome v. McCabe, 256 F.3d 747](#), and [Llovet v. Chicago, 761 F.3d 759](#). [U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983. Manuel v. City of Joliet, Ill., 137 S. Ct. 911 \(2017\).](#)

The realities of the prison environment require some amount of flexibility in the due process inquiry regarding punishment of pretrial detainees, so as to accommodate the very real interest of prison officials in maintaining order and safety. [U.S. Const. Amend. 14. Dilworth v. Adams, 841 F.3d 246 \(4th Cir. 2016\).](#)

A pretrial detainee challenging jail conditions must demonstrate a pervasive pattern of serious deficiencies in providing for his basic human needs; any lesser showing cannot prove punishment in violation of the detainee's due process rights. [U.S. Const. Amend. 14. Estate of Bonilla by and through Bonilla v. Orange County, Texas, 982 F.3d 298 \(5th Cir. 2020\).](#)

For qualified immunity purposes, it had been clearly established since at least 1989 that officials could be held liable for violating pretrial detainee's due process right to be protected from risk of suicide based on their acts or omissions that resulted in pretrial detainee's suicide if they had subjective knowledge of substantial risk of harm to detainee but responded with deliberate indifference to that risk. [U.S. Const. Amend. 14. Converse v. City of Kemah, Texas, 961 F.3d 771 \(5th Cir. 2020\).](#)

For a pretrial conditions of confinement claim under the Fourteenth Amendment, the proper inquiry is whether those conditions amount to punishment of the detainee. [U.S. Const. Amend. 14. *Cadena v. El Paso County*, 946 F.3d 717 \(5th Cir. 2020\).](#)

To violate the procedural or substantive due process rights of a pretrial detainee, a condition of confinement, i.e., a rule, a restriction, an identifiable intended condition or practice, or acts or omissions by a jail official that are sufficiently extended or pervasive, must be not reasonably related to a legitimate governmental objective and must cause the detainee's constitutional deprivation. [U.S. Const. Amend. 14. *Garza v. City of Donna*, 922 F.3d 626 \(5th Cir. 2019\).](#)

To successfully pursue a claim against his jailers for depriving him of liberty without due process in not investigating his claims of mistaken identity, former detainee must prove that his jailers acted with something akin to deliberate indifference in failing to ascertain that the person in their custody was not the person wanted on arrest warrant. [U.S. Const. Amend. 14. *Seales v. City of Detroit, Michigan*, 959 F.3d 235 \(6th Cir. 2020\).](#)

Arresting officer's alleged conduct in failing to obtain medical care for arrestee, who was allegedly bleeding profusely, after stopping her for driving while intoxicated, even though officer was allegedly aware of the bleeding and arrestee twice asked the officer to take her to the hospital, supported arrestee's § 1983 Fourth Amendment claim for unreasonably denying medical care for a serious medical condition. [U.S. Const. Amend. 4. *Otis v. Demarasse*, 886 F.3d 639 \(7th Cir. 2018\).](#)

Detainee's allegation that city attorney violated his due process rights and his right to be free from unreasonable seizure by causing an eight-day delay of his release from jail following dismissal of criminal charges against him was insufficient to state a plausible claim for relief in his § 1983 action against attorney, absent allegation that attorney did not immediately notify requisite people that charges had been dropped. [U.S. Const. Amends. 4, 14; 42 U.S.C.A. § 1983. *Lewis v. City of St. Louis*, 932 F.3d 646 \(8th Cir. 2019\).](#)

To constitute improper punishment at pretrial stage in violation of detainee's due process rights, the harm or disability caused by government's action to detainee must either significantly exceed, or be independent of, the inherent discomforts of confinement. [U.S. Const. Amend. 14. *Vazquez v. County of Kern*, 949 F.3d 1153 \(9th Cir. 2020\).](#)

Fourteenth Amendment standard applied in assessing constitutionality of governmental conduct directed at pretrial detainees is more protective than the Eighth Amendment standard for conduct directed at inmates, because the Fourteenth Amendment prohibits all punishment of pretrial detainees, while the Eighth Amendment only prevents the imposition of cruel and unusual punishment of convicted prisoners. [U.S. Const. Amends. 8, 14. *Vazquez v. County of Kern*, 949 F.3d 1153 \(9th Cir. 2020\).](#)

Deputy used excessive force against pretrial detainee, in violation of Due Process Clause, when, after having shocked detainee oncedropping him to floor, rendering him motionless, and causing him to urinate on himselfdeputy shocked him again eight seconds later, even though detainee failed to obey subsequent order to roll over and be handcuffed, where detainee had neither threatened nor attempted to harm officers, and was no longer resisting officers. [U.S. Const. Amend. 14. *Piazza v. Jefferson County, Alabama*, 923 F.3d 947 \(11th Cir. 2019\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Feeley v. Sampson](#), 570 F.2d 364 (1st Cir. 1978).
Ill.—[People v. Kelly](#), 404 Ill. 281, 89 N.E.2d 27 (1949).
Infringement of liberty prior to adjudication of guilt
Under certain circumstances, under the Due Process Clause, the government may fairly infringe on an individual's liberty interest and detain individuals prior to any adjudication of guilt for a variety of reasons:

if the police suspect an individual of a crime, they may arrest and detain the suspect until a neutral magistrate can determine whether probable cause exists, and following this determination, the government may then, for instance, deny bail and continue to detain a defendant pretrial in order to ensure his or her appearance if he or she is a flight risk, or to protect the public if he or she is dangerous.

Tex.—*Lakey v. Taylor*, 435 S.W.3d 309 (Tex. App. Austin 2014), reh'g overruled, (July 7, 2014).

2 U.S.—*City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983); *Kitchen v. Dallas County, Tex.*, 759 F.3d 468 (5th Cir. 2014); *Carl v. Muskegon County*, 763 F.3d 592 (6th Cir. 2014); *Tatum v. Moody*, 768 F.3d 806 (9th Cir. 2014).

D.C.—*Tyler v. U.S.*, 705 A.2d 270 (D.C. 1997).

N.D.—*United Hosp. v. D'Annunzio*, 514 N.W.2d 681 (N.D. 1994).

Challenges assessed on case-by-case basis

Due process challenges to pretrial detention must be assessed on a case-by-case basis.

U.S.—*U.S. v. Stanford*, 722 F. Supp. 2d 803 (S.D. Tex. 2010), aff'd, 394 Fed. Appx. 72 (5th Cir. 2010).

Conduct violating detainee's rights

To violate a plaintiff's rights as a pretrial detainee in a jail under the Due Process Clause, the defendant sheriff's conduct had to shock the conscience, and there had to be present circumstances indicating an evil intent or recklessness or at least deliberate indifference to the consequences of his or her conduct for those under his or her control and dependent upon him or her.

U.S.—*Stevens v. Dutchess County, N. Y.*, 445 F. Supp. 89 (S.D. N.Y. 1977).

3 Cal.—*Ochoa v. Superior Court*, 39 Cal. 3d 159, 216 Cal. Rptr. 661, 703 P.2d 1 (1985).

Mich.—*Jackson v. City of Detroit*, 449 Mich. 420, 537 N.W.2d 151 (1995).

Due process rights are at least as great as Eighth Amendment protections

Due process rights of a pretrial detainee are at least as great as the Eighth Amendment protections available to a convicted prisoner.

U.S.—*Smith v. Conway County, Ark.*, 759 F.3d 853 (8th Cir. 2014); *Keith v. DeKalb County, Georgia*, 749 F.3d 1034 (11th Cir. 2014).

Ariz.—*Braillard v. Maricopa County*, 224 Ariz. 481, 232 P.3d 1263 (Ct. App. Div. 2 2010).

Deliberate indifference standard

(1) The Due Process Clause of the Fourteenth Amendment affords pretrial detainees the same protection against deliberate indifference as the Eighth Amendment guarantees to the convicted.

U.S.—*Smith v. Knox County Jail*, 666 F.3d 1037 (7th Cir. 2012).

(2) A corrections official violates the Fourteenth Amendment if he or she is deliberately indifferent to a substantial risk of serious harm to a pretrial detainee, including violence inflicted by one detainee upon another detainee.

U.S.—*Mosher v. Nelson*, 589 F.3d 488 (1st Cir. 2009).

4 U.S.—*Smith v. Artison*, 779 F. Supp. 113 (E.D. Wis. 1991).

N.Y.—*Powlowski v. Wullich*, 102 A.D.2d 575, 479 N.Y.S.2d 89 (4th Dep't 1984).

N.D.—*United Hosp. v. D'Annunzio*, 514 N.W.2d 681 (N.D. 1994).

5 U.S.—*Bistran v. Levi*, 696 F.3d 352, 82 A.L.R. Fed. 2d 689 (3d Cir. 2012).

6 U.S.—*Lareau v. Manson*, 651 F.2d 96 (2d Cir. 1981).

Colo.—*People v. Juvenile Court, City and County of Denver*, 893 P.2d 81 (Colo. 1995).

7 U.S.—*Schall v. Martin*, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984); *Duvall v. Dallas County, Tex.*, 631 F.3d 203 (5th Cir. 2011); *Kingsley v. Hendrickson*, 744 F.3d 443 (7th Cir. 2014), cert. granted, 135 S. Ct. 1039, 190 L. Ed. 2d 908 (2015); *Smith v. Conway County, Ark.*, 759 F.3d 853 (8th Cir. 2014).

Colo.—*People v. Juvenile Court, City and County of Denver*, 893 P.2d 81 (Colo. 1995).

Iowa—*Polk County Sheriff v. Iowa Dist. Court for Polk County*, 594 N.W.2d 421 (Iowa 1999).

Punishment never constitutionally acceptable for presumptively innocent

Punishment may be constitutionally acceptable for persons convicted of crimes, at least so long as it does not amount to cruel and unusual punishment; but, under the Fourteenth Amendment's Due Process Clause, punishment is never constitutionally permissible for presumptively innocent individuals awaiting trial.

U.S.—*Blackmon v. Sutton*, 734 F.3d 1237 (10th Cir. 2013).

8 U.S.—*Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979); *Duvall v. Dallas County, Tex.*, 631 F.3d 203 (5th Cir. 2011).

Fla.—*Costello v. Strickland*, 418 So. 2d 443 (Fla. 1st DCA 1982).

- N.M.—*State v. Smallwood*, 94 N.M. 225, 1980-NMCA-037, 608 P.2d 537 (Ct. App. 1980).
- 9 Mich.—*York v. City of Detroit*, 438 Mich. 744, 475 N.W.2d 346 (1991).
- S.C.—*Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868 (2000).
- W. Va.—*State ex rel. Riley v. Rudloff*, 212 W. Va. 767, 575 S.E.2d 377 (2002).
- Deliberate indifference to serious medical needs**
- A jail official violates a pretrial detainee's Fourteenth Amendment right to due process if he or she acts with deliberate indifference to the serious medical needs of the detainee.
- Ala.—*Ex parte Hale*, 6 So. 3d 452 (Ala. 2008), as modified on denial of reh'g, (Oct. 10, 2008).
- 10 U.S.—*Miller v. Carson*, 563 F.2d 741 (5th Cir. 1977).
- Utah—*Wickham v. Fisher*, 629 P.2d 896 (Utah 1981).
- 11 Mo.—*Tyler v. Whitehead*, 583 S.W.2d 240 (Mo. Ct. App. W.D. 1979).
- 12 U.S.—*Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979); *Jordan v. Wolke*, 615 F.2d 749 (7th Cir. 1980); *D. B. v. Tewksbury*, 545 F. Supp. 896 (D. Or. 1982).
- Punishment in the constitutional sense**
- Punishment of a pretrial detainee that is prohibited by the Due Process Clause is punishment in the constitutional sense, not mere restrictions and conditions accompanying pretrial detention.
- U.S.—*Ford v. Bender*, 768 F.3d 15 (1st Cir. 2014).
- 13 U.S.—*Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979); *Bistrian v. Levi*, 696 F.3d 352, 82 A.L.R. Fed. 2d 689 (3d Cir. 2012); *Graves v. Arpaio*, 48 F. Supp. 3d 1318 (D. Ariz. 2014); *Duran v. Merline*, 923 F. Supp. 2d 702 (D.N.J. 2013).
- Fla.—*Costello v. Strickland*, 418 So. 2d 443 (Fla. 1st DCA 1982).
- Absence of legitimate state interest**
- In the absence of a legitimate state interest, a court may infer that an "arbitrary" or "purposeless" action against a pretrial detainee constitutes punishment for purposes of Fourteenth Amendment's due process "punishment" standard.
- U.S.—*Eason v. Frye*, 972 F. Supp. 2d 935 (S.D. Miss. 2013); *Tapp v. Proto*, 718 F. Supp. 2d 598 (E.D. Pa. 2010), *aff'd*, 404 Fed. Appx. 563 (3d Cir. 2010).
- 14 U.S.—*Hoover v. Watson*, 886 F. Supp. 410 (D. Del. 1995), *aff'd*, 74 F.3d 1226 (3d Cir. 1995); *Best v. New York City Dept. of Correction*, 14 F. Supp. 3d 341 (S.D. N.Y. 2014).
- 15 U.S.—*Spears v. Ruth*, 589 F.3d 249 (6th Cir. 2009); *Rice ex rel. Rice v. Correctional Medical Services*, 675 F.3d 650 (7th Cir. 2012).
- Claim under § 1983**
- A § 1983 claim of deliberate indifference in violation of the Due Process Clause, asserted by a pretrial detainee, requires: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than gross negligence.
- U.S.—*Franklin v. Curry*, 738 F.3d 1246, 87 Fed. R. Serv. 3d 544 (11th Cir. 2013).
- 16 U.S.—*Pittman ex rel. Hamilton v. County of Madison, Ill.*, 746 F.3d 766 (7th Cir. 2014); *Jackson v. Buckman*, 756 F.3d 1060 (8th Cir. 2014).
- 17 N.Y.—*Cooper v. Morin*, 49 N.Y.2d 69, 424 N.Y.S.2d 168, 399 N.E.2d 1188 (1979).
- 18 U.S.—*Brenneman v. Madigan*, 343 F. Supp. 128 (N.D. Cal. 1972); *Owens-El v. Robinson*, 442 F. Supp. 1368 (W.D. Pa. 1978).
- 19 N.Y.—*People v. Von Diezelski*, 78 Misc. 2d 69, 355 N.Y.S.2d 556 (County Ct. 1974).
- 20 U.S.—*U.S. v. Neal*, 679 F.3d 737 (8th Cir. 2012).
- Mass.—*Querubin v. Com.*, 440 Mass. 108, 795 N.E.2d 534 (2003).
- 21 U.S.—*Villanueva v. George*, 659 F.2d 851 (8th Cir. 1981); *Graves v. Arpaio*, 48 F. Supp. 3d 1318 (D. Ariz. 2014).
- 22 U.S.—*Miller v. Carson*, 563 F.2d 741 (5th Cir. 1977).
- 23 U.S.—*Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978).
- N.Y.—*Powlowski v. Wullich*, 81 Misc. 2d 895, 366 N.Y.S.2d 584 (Sup 1975).
- 24 U.S.—*Detainees of Brooklyn House of Detention for Men v. Malcolm*, 520 F.2d 392 (2d Cir. 1975).
- 25 U.S.—*Block v. Rutherford*, 468 U.S. 576, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984).
- Tex.—*Soria v. State*, 933 S.W.2d 46 (Tex. Crim. App. 1996).
- 26 U.S.—*Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).

- 27 U.S.—[Dawson v. Kendrick](#), 527 F. Supp. 1252 (S.D. W. Va. 1981).
- 28 Ill.—[People v. Kirkpatrick](#), 413 Ill. 595, 110 N.E.2d 519 (1953).
- Okla.—[Lawler v. State](#), 1969 OK CR 146, 453 P.2d 333 (Okla. Crim. App. 1969).
- 29 Cal.—[People v. Jenkins](#), 22 Cal. 4th 900, 95 Cal. Rptr. 2d 377, 997 P.2d 1044 (2000), as modified, (June 28, 2000).
- Mo.—[Winters v. State](#), 630 S.W.2d 121 (Mo. Ct. App. E.D. 1981).
- 30 U.S.—[Bell v. Wolfish](#), 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979); [Lareau v. Manson](#), 651 F.2d 96 (2d Cir. 1981).
- Double-celling**
- U.S.—[Jones v. City and County of San Francisco](#), 976 F. Supp. 896 (N.D. Cal. 1997).
- 31 U.S.—[Owens-El v. Robinson](#), 442 F. Supp. 1368 (W.D. Pa. 1978).
- Plumbing**
- U.S.—[Dawson v. Kendrick](#), 527 F. Supp. 1252 (S.D. W. Va. 1981).
- Reasonable night's sleep**
- Due process of law requires that a defendant not be denied the opportunity for a reasonable night's sleep before each day of his or her trial.
- U.S.—[Dillard v. Pitchess](#), 399 F. Supp. 1225 (C.D. Cal. 1975).
- 32 U.S.—[Dawson v. Kendrick](#), 527 F. Supp. 1252 (S.D. W. Va. 1981).
- 33 U.S.—[Duran v. Elrod](#), 542 F.2d 998 (7th Cir. 1976).
- Prohibition of contact visits**
- A county jail's blanket prohibition against contact visits between pretrial detainees and their spouses, relatives, children, and friends was an entirely reasonable, nonpunitive response to legitimate security concerns and was consistent with the Fourteenth Amendment.
- U.S.—[Block v. Rutherford](#), 468 U.S. 576, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984).
- 34 U.S.—[Barnes v. District of Columbia](#), 793 F. Supp. 2d 260 (D.D.C. 2011).
- Deliberate indifference**
- Prolonged detention of a pretrial detainee will not rise to the level of a Fourteenth Amendment violation unless a defendant acted with deliberate indifference.
- U.S.—[Blair v. Nebraska Department of Correctional Services](#), 719 F. Supp. 2d 1072 (D. Neb. 2010).
- 35 U.S.—[U.S. v. Briggs](#), 697 F.3d 98 (2d Cir. 2012), as amended, (Oct. 9, 2012).
- Duration of pretrial detention will rarely by itself offend due process**
- U.S.—[U.S. v. Landron-Class](#), 705 F. Supp. 2d 154 (D.P.R. 2010); [U.S. v. Stanford](#), 722 F. Supp. 2d 803 (S.D. Tex. 2010), *aff'd*, 394 Fed. Appx. 72 (5th Cir. 2010).
- 36 U.S.—[U.S. v. Briggs](#), 697 F.3d 98 (2d Cir. 2012), as amended, (Oct. 9, 2012); [U.S. v. Stanford](#), 722 F. Supp. 2d 803 (S.D. Tex. 2010), *aff'd*, 394 Fed. Appx. 72 (5th Cir. 2010).
- 37 U.S.—[U.S. v. Millan](#), 4 F.3d 1038 (2d Cir. 1993);
- U.S.—[U.S. v. Stanford](#), 722 F. Supp. 2d 803 (S.D. Tex. 2010), *aff'd*, 394 Fed. Appx. 72 (5th Cir. 2010).
- 38 D.C.—[U. S. v. Edwards](#), 430 A.2d 1321 (D.C. 1981).
- 39 U.S.—[Epps v. Levine](#), 457 F. Supp. 561 (D. Md. 1978).
- Transfer of pretrial detainees**
- The minimum requirement of notice and opportunity to be heard in opposition to the transfer of a pretrial detainee from a correctional institution to another correctional institution, or a prompt posttransfer hearing in cases of emergency transfers, would adequately safeguard the federally protected liberty interests of pretrial detainees.
- U.S.—[Cobb v. Aytych](#), 643 F.2d 946 (3d Cir. 1981).
- 40 U.S.—[Jones v. Diamond](#), 594 F.2d 997 (5th Cir. 1979), on reh'g, 636 F.2d 1364 (5th Cir. 1981) (overruled on other grounds by, [International Woodworkers of America, AFL-CIO and its Local No. 5-376 v. Champion Intern. Corp.](#), 790 F.2d 1174, 4 Fed. R. Serv. 3d 721 (5th Cir. 1986)).
- 41 D.C.—[Blunt v. U. S.](#), 322 A.2d 579 (D.C. 1974).
- 42 U.S.—[Ford v. Bender](#), 768 F.3d 15 (1st Cir. 2014); [Potts v. Moreci](#), 12 F. Supp. 3d 1065 (N.D. Ill. 2013); [Best v. New York City Dept. of Correction](#), 14 F. Supp. 3d 341 (S.D. N.Y. 2014).
- Written notice of disciplinary charges**
- U.S.—[Muhmmaud v. Murphy](#), 632 F. Supp. 2d 171 (D. Conn. 2009).
- 43 Haw.—[State v. Raitz](#), 63 Haw. 64, 621 P.2d 352 (1980).

44

U.S.—[Cudnik v. Kreiger](#), 392 F. Supp. 305 (N.D. Ohio 1974).

Use of antipsychotic drugs

Prisoners or pretrial detainees have a protectible liberty interest in avoiding unwanted medication with antipsychotic drugs.

Neb.—[State v. Baker](#), 245 Neb. 153, 511 N.W.2d 757 (1994).

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16C C.J.S. Constitutional Law § 1632

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

C. Preliminary Proceedings; Arrest or Detention; Bail; Summary Trial

§ 1632. Constitutional rights with respect to bail or release on one's own recognizance

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4530 to 4532, 4534 to 4552, 4701

The Due Process Clause affirms the right to bail, but due process does not require that everyone charged with a crime be released on bail pending his or her trial.

The Due Process Clause affirms the right to bail,¹ but due process does not require that everyone charged with a crime be released on bail pending his or her trial.² A refusal to lower bail or to release on personal recognizance is not a denial of due process³ even in situations where a proper motion for a reduction of bail is presented to the trial court.⁴ Nonetheless, the constitutional prohibition of deprivation of liberty without due process is applicable to pretrial release procedures.⁵ Furthermore, the imposition of the prohibition of the Eighth Amendment to the United States Constitution against requiring excessive bail is applicable to the states through the Fourteenth Amendment.⁶

Where bail is authorized by statute⁷ or constitution,⁸ the arbitrary denial of bail violates due process. The due process guaranty in such instance prohibits such things as the denial of an opportunity to be heard, bias on the part of the decisionmaker, or the willful misapplication of statutory standards for granting bail.⁹ Similarly, where pretrial release on recognizance is authorized by statute, preventing access to such release for all persons denies due process.¹⁰ In addition, modern notions of due process and

fundamental fairness demand that a citizen should not arbitrarily be denied bail solely because there is no statute specifically authorizing the granting of bail.¹¹

The denial of bail when a defendant has the ability to post bail and when a defendant is not physically, mentally, or emotionally in a condition to pose a danger to him- or herself or the community is a denial of due process.¹² Furthermore, due process requires that a hearing be had upon an application of the State to increase the amount of bail, and notice to the accused of such a hearing.¹³ Although it has been found that a defendant is not denied due process by reason of the fact that the trial court, after adjudication of the defendant's insolvency and the appointment of defense counsel, requires a bail bond surety as a condition to the defendant's pretrial release,¹⁴ it has also been considered that a bail system based on monetary bail alone is unconstitutional as a denial of due process.¹⁵ It is violative of due process to put a petitioner in the situation of having to choose between posting bail or taking an appeal.¹⁶ The trial court in fixing bail may consider a defendant's prior conviction without denying due process.¹⁷

Due process of law is not violated by a statute regulating the business of professional bondsmen.¹⁸ A statute permitting those who have become bail for an accused to relieve themselves of the undertaking by surrendering the accused is not offensive to due process,¹⁹ and statutes prescribing methods for the release of defendants pending final judgment do not deprive bail bondsmen of their property in violation of due process.²⁰

Due process of law is not violated by statutes prescribing the manner of forfeiting an appearance bond and the conditions under which forfeiture may be set aside.²¹ Due process requirements apply to bail revocation or forfeiture proceedings,²² and permitting the revocation or forfeiture of bail upon an ex parte determination, without providing an opportunity to be heard and to contest, is a denial of due process.²³ In a hearing for bail forfeiture, however, a defendant is not entitled to all the due process rights of a full scale trial,²⁴ and a bondsman is not denied due process by the failure to advise it of a forfeiture on the defendant's failure to appear.²⁵

Proof evident or presumption great.

A defendant may be denied bail in a capital case without being deprived of due process where the proof of guilt is evident or the presumption great.²⁶ However, a deprivation of liberty without due process of law may consist of the denial of the right to bail to a person charged with a crime which is not a capital offense or is a capital offense, but the proof of guilt is not evident nor the presumption great.²⁷ Furthermore, by imposing an unshakable, irrebuttable presumption of nonappearance for trial, a bail procedure violates due process insofar as it denies bond to an accused awaiting trial on a life felony charge when the proof of guilt is evident and the presumption thereof great.²⁸

A defendant charged with an offense punishable by up to life in prison has a right to counsel at a bail hearing under a statute providing that a person charged with such an offense shall not be allowed bail where the proof is evident or the presumption great that the person will be convicted.²⁹

Bail pending sentence.

A convicted defendant's liberty interest in his or her continued release pending sentencing must be weighted against government's strong and obvious countervailing interest in detaining defendants who have been found guilty beyond a reasonable doubt of serious crimes;³⁰ such detention provides public safety by removing a presumptively dangerous person

from the community and encourages general respect for law by signaling that a guilty person will not be able to avoid or delay imposition and service of sentence prescribed by law.³¹

Bail pending appeal.

Due process of law is not violated by statutes denying bail pending an appeal;³² however, once a state has made provision for such bail, due process requires that it not be denied arbitrarily or unreasonably.³³ While it has been held that a failure of the trial judge to indicate on the record, at the time of his or her ruling on a motion for bail pending appeal, the factors he or she considered and the facts upon which he or she relied, constitutes a violation of the Fourteenth Amendment's Due Process Clause,³⁴ it has also been held that a failure to provide reasons for the denial of bail in a postconviction context is not per se arbitrary action in violation of the constitutional guaranty,³⁵ and even if there is error in the discretionary judgment of the court in denying bail pending appeal, such is not a violation of due process.³⁶ Where a defendant is released on bail pending appeal of his or her conviction, the conditional liberty involved in such release is within the protection of the constitutional guaranty of due process,³⁷ which requires notice and an opportunity to be heard in the revocation³⁸ or modification of an appeal bail bond.³⁹

Additional costs.

Where a charge of a particular percent of the total amount of bail is denoted as bail bond costs and is an administrative cost rather than a charge imposed for the costs of prosecution, it does not offend due process though imposed alike upon those found guilty and those acquitted.⁴⁰ The imposition of a penalty assessment upon bail in traffic cases with the proceeds earmarked for high school driver education has been considered a deprivation of due process.⁴¹ Furthermore, a county's retention of any interest that is earned on a cash bail bond deposit before the time when the conditions of bail are satisfactorily performed has been found to violate the due process provision of a state constitution.⁴²

CUMULATIVE SUPPLEMENT

Cases:

Even where a defendant has been charged with first-degree murder, if the Commonwealth asks for pretrial detention due to the danger that the defendant may pose to another person or the community, due process requires a judge, before denying bail, to follow the statutory procedures addressing conditions for pretrial release of persons accused of certain offenses involving physical force or abuse, if the judge would have released the defendant on bail but for the danger the defendant poses to the community. [U.S. Const. Amend. 14](#); [Mass. Const. pt. 1, arts. 1, 10, 12](#); [Mass. Gen. Laws Ann. ch. 265, § 1](#); [Mass. Gen. Laws Ann. ch. 276, § 58A](#). [Vasquez v. Commonwealth](#), 481 Mass. 747, 119 N.E.3d 717 (2019).

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Footnotes

- 1 [U.S.—Fields v. Henry County, Tenn.](#), 701 F.3d 180 (6th Cir. 2012), cert. denied, 133 S. Ct. 2036, 185 L. Ed. 2d 887 (2013).
[R.I.—Mello v. Superior Court](#), 117 R.I. 578, 370 A.2d 1262 (1977).
Denial of bail must comport with requirements of due process
[U.S.—Dodds v. Richardson](#), 614 F.3d 1185 (10th Cir. 2010).

State Constitution

Ky.—[Commonwealth v. Carman](#), 455 S.W.3d 916 (Ky. 2015).

U.S.—[Kelly v. Springett](#), 527 F.2d 1090 (9th Cir. 1975).

Neb.—[State v. Boppre](#), 234 Neb. 922, 453 N.W.2d 406 (1990).

Denial of bail where defendant poses flight risk

Mass.—[Querubin v. Com.](#), 440 Mass. 108, 795 N.E.2d 534 (2003).

Tex.—[Lakey v. Taylor](#), 435 S.W.3d 309 (Tex. App. Austin 2014), reh'g overruled, (July 7, 2014).

U.S.—[State of Tex. v. Whittington](#), 391 F.2d 905 (5th Cir. 1968).

Restrictive conditions of release

(1) The imposition of random drug testing and warrantless search and seizure conditions to release an accused from custody on his or her own recognizance does not violate the accused's due process rights.

Cal.—[In re York](#), 9 Cal. 4th 1133, 40 Cal. Rptr. 2d 308, 892 P.2d 804 (1995).

(2) Conditions of a defendant's pretrial release, including a restriction on her ability to change her residence, did not amount to punishment under the Due Process Clause; pretrial release could be accompanied by burdensome conditions that effected a significant restraint of liberty.

U.S.—[Gardner v. Luzerne County](#), 645 F. Supp. 2d 325 (M.D. Pa. 2009).

U.S.—[State of Tex. v. Whittington](#), 391 F.2d 905 (5th Cir. 1968).

Mass.—[Querubin v. Com.](#), 440 Mass. 108, 795 N.E.2d 534 (2003).

N.H.—[Larose v. Superintendent, Hillsborough County Correction Admin.](#), 142 N.H. 364, 702 A.2d 326 (1997).

R.I.—[Witt v. Moran](#), 572 A.2d 261 (R.I. 1990).

Bail cannot be denied to inflict pretrial punishment

Vt.—[State v. Gardner](#), 167 Vt. 600, 709 A.2d 499 (1998).

Hearing required

If the State alleges a defendant is not entitled to bail under the Arizona Constitution, due process requires that the defendant receive a full hearing at which the defendant may be represented by counsel, cross-examine witnesses, and present evidence.

Ariz.—[In re Bond Forfeiture in Cochise County Cause No. CR201100916](#), 232 Ariz. 553, 307 P.3d 980 (Ct. App. Div. 2 2013).

Right to counsel, notice, and opportunity to be heard

A court cannot refuse to set bail and detain a defendant pending trial under Constitutional exceptions to the presumption that all persons are bailable pending trial without first providing the defendant with adequate procedural due process protections, including the right to counsel, notice, and an opportunity to be heard.

N.M.—[State v. Brown](#), 2014-NMSC-038, 338 P.3d 1276 (N.M. 2014).

Burden of proof

Due process requires the burden of proof concerning a detainee's likelihood of appearing for future court proceedings to be borne by the prosecution at the detainee's "own recognizance" release hearing; however, due process does not require the prosecution to bear the burden of producing evidence of the detainee's lack of community ties.

Cal.—[Van Atta v. Scott](#), 27 Cal. 3d 424, 166 Cal. Rptr. 149, 613 P.2d 210 (1980).

U.S.—[Sistrunk v. Lyons](#), 646 F.2d 64 (3d Cir. 1981); [U.S. v. Polouizzi](#), 697 F. Supp. 2d 381 (E.D. N.Y. 2010).

Bail not excessive

Tex.—[Carr v. State](#), 475 S.W.2d 755 (Tex. Crim. App. 1972).

U.S.—[Atkins v. People of State of Mich.](#), 644 F.2d 543 (6th Cir. 1981).

Haw.—[Huihui v. Shimoda](#), 64 Haw. 527, 644 P.2d 968 (1982).

Fla.—[Nix v. McCallister](#), 202 So. 2d 1 (Fla. 1st DCA 1967).

U.S.—[Grady v. Iowa State Penitentiary](#), 346 F. Supp. 681 (N.D. Iowa 1972).

U.S.—[Alberti v. Sheriff of Harris County, Texas](#), 406 F. Supp. 649 (S.D. Tex. 1975).

U.S.—[West v. Janing](#), 449 F. Supp. 548 (D. Neb. 1978).

Neb.—[State ex rel. Partin v. Jensen](#), 203 Neb. 441, 279 N.W.2d 120 (1979).

Ohio—[State v. Meyers](#), 59 Ohio Misc. 124, 13 Ohio Op. 3d 343, 394 N.E.2d 1037 (Mun. Ct. 1978).

Bail Reform Act of 1984

The Due Process Clause does not categorically prohibit pretrial detention imposed under the Bail Reform Act of 1984 as a regulatory measure on the ground of community danger.

U.S.—*U.S. v. Savides*, 658 F. Supp. 1399 (N.D. Ill. 1987), decision aff'd, 898 F.2d 1218 (7th Cir. 1990).

Due process violated by amendments to bail statute

Due process was violated by amendments to a bail statute which provided that the official authorized to admit a prisoner or arrested person to bail could refuse to release such person if the judicial officer determined, in the exercise of his or her discretion, that such release would endanger the safety of any other person or community, and which mandated that the judicial officer take into account the nature and seriousness of danger to any person or to the community that would be posed by the prisoner's release when determining the amount of bail; the amendments applied to any arrestee, did not provide procedures designed to further the accuracy of the judicial officer's determination of the arrestee's dangerousness, did not provide that the arrestee had a right to testify, and did not provide that the arrestee could cross-examine adverse witnesses at a bail hearing.

Mass.—*Aime v. Com.*, 414 Mass. 667, 611 N.E.2d 204 (1993).

Constitutional provision

An Arizona constitutional provision forbidding any form of bail or pretrial release to undocumented immigrants arrested for serious felony offenses, without regard to whether they were dangerous or a flight risk, was not narrowly tailored to serve a compelling state interest in ensuring that persons accused of crimes be available for trial, and thus violated substantive due process; there was no evidence that the provision was adopted to address a particularly acute problem regarding an unmanageable flight risk of undocumented immigrants, the provision encompassed an exceedingly broad range of offenses, including not only serious offenses but also relatively minor ones, and the provision employed an overbroad, irrebuttable presumption, rather than an individualized hearing, to determine whether a particular arrestee posed an unmanageable flight risk.

U.S.—*Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014).

Ind.—*Vacendak v. State*, 261 Ind. 317, 302 N.E.2d 779 (1973).

Fla.—*Walls v. Genung*, 198 So. 2d 30 (Fla. 1967).

U.S.—*Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978).

Miss.—*Lee v. Lawson*, 375 So. 2d 1019 (Miss. 1979).

U.S.—*U.S. v. Scharf*, 354 F. Supp. 450 (E.D. Pa. 1973), aff'd, 480 F.2d 919 (3d Cir. 1973).

Cal.—*People v. Bryan*, 3 Cal. App. 3d 327, 83 Cal. Rptr. 291 (2d Dist. 1970).

Ga.—*Jackson v. Beavers*, 156 Ga. 71, 118 S.E. 751 (1923).

A.L.R. Library

Bail: effect on surety's liability under bail bond of principal's subsequent incarceration in same jurisdiction, 35 A.L.R.4th 1192.

Bail: duration of surety's liability on pretrial bond, 32 A.L.R.4th 504.

Tex.—*Ex parte Vogler*, 495 S.W.2d 893 (Tex. Crim. App. 1973).

Or.—*Burton v. Tomlinson*, 19 Or. App. 247, 527 P.2d 123 (1974).

La.—*State v. Young*, 142 La. 865, 77 So. 772 (1918).

A.L.R. Library

Forfeiture of bail for breach of conditions of release other than that of appearance, 68 A.L.R.4th 1082.

State statutes making default on bail a separate criminal offense, 63 A.L.R.4th 1064.

Cal.—*People v. Surety Ins. Co.*, 76 Cal. App. 3d 57, 143 Cal. Rptr. 47 (2d Dist. 1977).

Ga.—*Hood v. Carsten*, 267 Ga. 579, 481 S.E.2d 525 (1997).

Nev.—*Wilshire Ins. Co. v. State*, 94 Nev. 546, 582 P.2d 372 (1978).

Jumping bail

Due process does not require that the government give a bail jumper notice of the fact that he or she is being accused of jumping bail when probable cause exists for the charge.

U.S.—*U.S. v. Kripplebauer*, 463 F. Supp. 291 (E.D. Pa. 1978).

Review by federal court

The question to be answered by a federal court in considering whether a state court's revocation of bail violated due process was not whether the federal court might have decided the bail request differently in the first instance, but rather whether the decision of the state trial judge was beyond the range within which judgments could rationally differ in relation to the apparent elements of the situation; revocation would have to amount to legal arbitrariness in the administration of bail rights provided, in violation of due process.

U.S.—*U. S. ex rel. Means v. Solem*, 440 F. Supp. 544 (D.S.D. 1977).

- 23 Ga.—*Smith v. Nichols*, 270 Ga. 550, 512 S.E.2d 279 (1999).
- N.M.—*Tijerina v. Baker*, 1968-NMSC-009, 78 N.M. 770, 438 P.2d 514 (1968).
- Vt.—*State v. Knight*, 135 Vt. 453, 380 A.2d 61 (1977).
- 24 R.I.—*State v. Wilson*, 118 R.I. 627, 375 A.2d 931 (1977).
- 25 D.C.—*American Bankers Ins. Co. v. U.S.*, 596 A.2d 598 (D.C. 1991).
- La.—*State v. Mitchell*, 337 So. 2d 1186 (La. 1976).
- N.M.—*State v. Amador*, 1982-NMSC-083, 98 N.M. 270, 648 P.2d 309, 33 A.L.R.4th 656 (1982).
- 26 U.S.—*McCarroll v. Faust*, 278 F. Supp. 448 (E.D. La. 1968).
- Del.—*Steigler v. Superior Court In and For New Castle County*, 252 A.2d 300 (Del. 1969).
- 27 Ill.—*People v. Kirkpatrick*, 413 Ill. 595, 110 N.E.2d 519 (1953).
- Ind.—*Bozovichar v. State*, 230 Ind. 358, 103 N.E.2d 680 (1952) (abrogated on other grounds by, *Fry v. State*, 990 N.E.2d 429 (Ind. 2013)).
- 28 U.S.—*Escandar v. Ferguson*, 441 F. Supp. 53 (S.D. Fla. 1977).
- 29 N.H.—*State v. Furgal*, 161 N.H. 206, 13 A.3d 272 (2010).
- 30 U.S.—*U.S. v. Santiago-Mendez*, 599 F. Supp. 2d 95 (D.P.R. 2009).
- 31 U.S.—*U.S. v. Santiago-Mendez*, 599 F. Supp. 2d 95 (D.P.R. 2009).
- 32 U.S.—*U. S. ex rel. Fink v. Heyd*, 408 F.2d 7 (5th Cir. 1969).
- Or.—*Hanson v. Gladden*, 246 Or. 494, 426 P.2d 465 (1967).
- Rule does not violate due process**
- The rule governing bail on appeal did not violate due process on the ground that it prohibited release on appeal in certain cases without providing a hearing.
- Ark.—*Meeks v. State*, 341 Ark. 620, 19 S.W.3d 25 (2000).
- Conclusive presumption**
- The fact that a statute or rule prohibiting bail pending appeal of a convicted felon who has previously been convicted of another felony provided a conclusive presumption that certain individuals will be unreasonable bail risks pending appeal did not offend the Due Process Clause.
- U.S.—*MacLean v. Rouse*, 506 F. Supp. 1313 (S.D. Fla. 1981).
- Fla.—*Gallie v. Wainwright*, 362 So. 2d 936 (Fla. 1978).
- 33 U.S.—*Young v. Hubbard*, 673 F.2d 132 (5th Cir. 1982); *Martin v. Diguglielmo*, 644 F. Supp. 2d 612 (W.D. Pa. 2008).
- Okla.—*Nauni v. Cannon*, 1981 OK CR 50, 628 P.2d 372 (Okla. Crim. App. 1981).
- Tex.—*Ex parte Williams*, 630 S.W.2d 803 (Tex. App. San Antonio 1982), petition for discretionary review refused, (May 5, 1983).
- Determination based on hearsay denies due process**
- U.S.—*Reddy v. Snepp*, 357 F. Supp. 999 (W.D. N.C. 1973).
- 34 S.D.—*State v. Caruso*, 2012 SD 65, 821 N.W.2d 386 (S.D. 2012).
- 35 U.S.—*Brown v. Wilmot*, 443 F. Supp. 118 (S.D. N.Y. 1977), judgment aff'd, 572 F.2d 404 (2d Cir. 1978).
- 36 U.S.—*U. S. ex rel. Cameron v. People of State of N. Y.*, 383 F. Supp. 182 (E.D. N.Y. 1974).
- 37 U.S.—*Hohman v. Hogan*, 474 F. Supp. 1290 (D. Vt. 1979).
- 38 U.S.—*Hohman v. Hogan*, 474 F. Supp. 1290 (D. Vt. 1979).
- Ga.—*Riggins v. State*, 134 Ga. App. 941, 216 S.E.2d 723 (1975).
- 39 Wash.—*State v. Holland*, 7 Wash. App. 676, 501 P.2d 1243 (Div. 3 1972).
- 40 U.S.—*Schilb v. Kuebel*, 404 U.S. 357, 92 S. Ct. 479, 30 L. Ed. 2d 502 (1971).
- Fines and costs**
- Sureties were not denied procedural due process by the application of a statute authorizing the use of bail money to pay fines and costs imposed on the defendant; due process was satisfied by the publication of the statute, the length of time the statute had been in effect, and primarily by the notice language on the bond receipt itself, which both sureties signed.
- Wis.—*State v. Iglesias*, 185 Wis. 2d 117, 517 N.W.2d 175, 42 A.L.R.5th 909 (1994).
- 41 Mont.—*State ex rel. Sanders v. City of Butte*, 151 Mont. 171, 441 P.2d 190 (1968).
- 42 Mont.—*Siroky v. Richland County*, 271 Mont. 67, 894 P.2d 309 (1995).

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16C C.J.S. Constitutional Law § 1633

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

C. Preliminary Proceedings; Arrest or Detention; Bail; Summary Trial

§ 1633. Constitutional rights with respect to preliminary criminal hearings or examination and commitment

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4569 to 4571

In the absence of prejudice, the want of a preliminary hearing or committal does not impair the final trial or in and of itself constitute a denial of due process.

In the absence of prejudice,¹ the want of a preliminary hearing or committal trial does not impair the final trial or in and of itself constitute a denial of due process,² as where the accused waives such hearing,³ or where the accused is indicted,⁴ or where an information is filed by the prosecuting attorney.⁵ However, it has also been found that the denial of a preliminary hearing constitutes a lack of due process of law⁶ and that a legal preliminary examination is one of the steps required to establish due process of law where the prosecution is by information and is necessary to confer jurisdiction on the trial court.⁷

In this connection, due process requires the State to provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.⁸ In any event, due process requires that the nature and duration of the commitment bear some reasonable relation to the purpose for which the individual is committed.⁹ Since an adversary hearing is not required and since the probable cause standard for pretrial detention is the same as that for arrest, a person arrested pursuant to a warrant issued by a magistrate on

a showing of probable cause is not constitutionally entitled to a separate judicial determination that there is probable cause to detain him or her pending trial.¹⁰

Where a hearing is to take place, the failure to present the accused before a magistrate without undue delay is a fact to be considered on the question of due process;¹¹ thus, a detention for a period longer than is reasonably necessary after an arrest violates the guaranty.¹² However, the reasonableness of the delay must be determined with regard to the facts and circumstances of each case,¹³ and absent a showing of prejudice,¹⁴ a mere delay in granting a preliminary hearing cannot properly be adjudged as a denial of due process.¹⁵ Accordingly, particular delays in taking an accused before a magistrate have been found to violate,¹⁶ or not to violate, the constitutional guarantee.¹⁷

Due process of law is not denied by a statute or constitutional amendment providing for the accusation and trial of accused persons without a preliminary examination¹⁸ or by a statute which, either alone or when read in the light of other statutes, contemplates that the accused, after a preliminary examination and in default of bail, may be committed to jail to await trial or the action of the grand jury.¹⁹ Holding an accused in custody by virtue of a commitment which discloses on its face that the date fixed for his or her incarceration has passed constitutes a denial of due process.²⁰ Furthermore, once a judicial officer has determined that probable cause does not exist, it would be the most naked deprivation of due process to retain the defendant in custody pending appeal by the State.²¹

Incompetents and minors.

A preliminary hearing that takes place when a defendant is incompetent is conclusively violative of due process regardless of the extent of cross-examination by counsel or of any other facts in the case.²² Just as the principle that due process requires that the nature and duration of the commitment bear some reasonable relation to the purpose for which the individual is committed limits the permissible length of a commitment on account of incompetence to stand trial, it also limits the permissible length of a commitment for observation.²³ However, under federal standards, if other standards of due process are met, it is not a denial of constitutional due process to commit an unconvicted accused person to a mental institution before trial.²⁴

Due process does not require a prosecuting attorney to hold an adversary hearing prior to determining the manner in which a minor offender will be proceeded against.²⁵ A minor petitioner who is certified as an adult for trial is entitled under due process requirements to an early preliminary hearing.²⁶

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Footnotes

- 1 **No prejudice shown**
Fla.—*Zide v. State*, 253 So. 2d 917 (Fla. 3d DCA 1971).
Burden of proof
A defendant asserting that the absence of a preliminary hearing violated the federal guarantees of due process so as to require the dismissal of the charges bears the initial burden of showing that he or she has been significantly prejudiced by the absence of the hearing, and only after such a showing does the burden shift to the government to demonstrate the reasonableness of the delay.
Ill.—*People v. Holman*, 103 Ill. 2d 133, 82 Ill. Dec. 585, 469 N.E.2d 119 (1984).
- 2 Cal.—*Bowens v. Superior Court*, 1 Cal. 4th 36, 2 Cal. Rptr. 2d 376, 820 P.2d 600 (1991).
Kan.—*State v. Knighten*, 260 Kan. 47, 917 P.2d 1324 (1996).
- 3 U.S.—*U. S. ex rel. Morford v. Hocker*, 268 F. Supp. 864 (D. Nev. 1967), judgment aff'd, 394 F.2d 169 (9th Cir. 1968).

Waiver by attorney

Miss.—*Glass v. State*, 278 So. 2d 384 (Miss. 1973).

N.D.—*State v. Barlow*, 193 N.W.2d 455 (N.D. 1971).

Requirement for valid waiver

Due process does not require that a particular procedure be employed for a valid waiver of a preliminary hearing; rather, all that is required is that the waiver be understandingly made.

Ill.—*People v. Puleo*, 96 Ill. App. 3d 457, 51 Ill. Dec. 859, 421 N.E.2d 367 (1st Dist. 1981).

Kan.—*State v. Wright*, 259 Kan. 117, 911 P.2d 166 (1996).

N.C.—*State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981).

U.S.—*Government of Virgin Islands v. Bolones*, 7 V.I. 516, 427 F.2d 1135 (3d Cir. 1970).

Ill.—*People v. Franklin*, 80 Ill. App. 3d 128, 35 Ill. Dec. 121, 398 N.E.2d 1071 (1st Dist. 1979).

Mo.—*State v. Watts*, 601 S.W.2d 617 (Mo. 1980).

U.S.—*Goodwin v. Page*, 296 F. Supp. 1205 (E.D. Okla. 1969), judgment aff'd, 418 F.2d 867 (10th Cir. 1969).

N.M.—*State v. Garcia*, 1968-NMSC-119, 79 N.M. 367, 443 P.2d 860 (1968).

Pretrial judicial determination of probable cause required to satisfy due process

Mont.—*State v. White*, 2014 MT 335, 377 Mont. 332, 339 P.3d 1243 (2014).

When arrest occurs without a warrant

Mass.—*Com. v. Jackson*, 447 Mass. 603, 855 N.E.2d 1097 (2006).

Cal.—*People v. Brooks*, 72 Cal. App. 2d 657, 165 P.2d 51 (4th Dist. 1946).

U.S.—*Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979).

Okla.—*Baker v. State*, 1996 OK CR 49, 927 P.2d 577 (Okla. Crim. App. 1996).

U.S.—*Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972).

U.S.—*Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979).

Okla.—*Baker v. State*, 1996 OK CR 49, 927 P.2d 577 (Okla. Crim. App. 1996).

Kan.—*State v. Wakefield*, 267 Kan. 116, 977 P.2d 941 (1999).

Wis.—*State v. Hughes*, 68 Wis. 2d 662, 229 N.W.2d 655 (1975).

Wis.—*Wagner v. State*, 89 Wis. 2d 70, 277 N.W.2d 849 (1979).

Kan.—*State v. Wakefield*, 267 Kan. 116, 977 P.2d 941 (1999).

Wis.—*State v. Hughes*, 68 Wis. 2d 662, 229 N.W.2d 655 (1975).

Kan.—*State v. Scott*, 286 Kan. 54, 183 P.3d 801 (2008).

N.M.—*State v. Olguin*, 1968-NMSC-012, 78 N.M. 661, 437 P.2d 122 (1968).

Dismissal warranted on showing of prejudice

S.D.—*State v. Larson*, 2009 SD 107, 776 N.W.2d 254 (S.D. 2009).

Kan.—*State v. Johnson*, 222 Kan. 465, 565 P.2d 993 (1977).

Miss.—*Thomas v. State*, 645 So. 2d 1345 (Miss. 1994).

Nev.—*Watson v. Sheriff, Elko County*, 93 Nev. 236, 562 P.2d 1133 (1977).

Kan.—*State v. Laubach*, 220 Kan. 679, 556 P.2d 405 (1976).

N.C.—*State v. Siler*, 292 N.C. 543, 234 S.E.2d 733 (1977).

One-day delay

A one-day delay following the arrest of a rape defendant before his initial appearance hearing did not violate due process in the absence of a showing that the delay adversely prejudiced his receipt of a fair and impartial trial.

Miss.—*Thomas v. State*, 645 So. 2d 1345 (Miss. 1994).

Wyo.—*Crouse v. State*, 384 P.2d 321 (Wyo. 1963).

Tenn.—*Moye v. State*, 139 Tenn. 680, 202 S.W. 919 (1918).

Kan.—*Whalen v. Cristell*, 161 Kan. 747, 173 P.2d 252 (1946).

Nev.—*Gary v. Sheriff, Clark County*, 96 Nev. 78, 605 P.2d 212 (1980).

Cal.—*Bayramoglu v. Superior Court*, 124 Cal. App. 3d 718, 176 Cal. Rptr. 487 (1st Dist. 1981).

U.S.—*McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 92 S. Ct. 2083, 32 L. Ed. 2d 719 (1972).

U.S.—*Lindner v. Peterson*, 324 F. Supp. 1261 (W.D. Mo. 1971).

Neb.—*State v. Grayer*, 191 Neb. 523, 215 N.W.2d 859 (1974).

Okla.—*Application of Wiggins*, 1967 OK CR 52, 425 P.2d 1004 (Okla. Crim. App. 1967).

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16C C.J.S. Constitutional Law § 1634

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

C. Preliminary Proceedings; Arrest or Detention; Bail; Summary Trial

§ 1634. Constitutional rights with respect to preliminary criminal hearings or examination and commitment—Procedure

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 4569 to 4571

A preliminary hearing must comport with the requirements of due process, and, generally, due process of law requires adherence to the adopted and recognized rules of evidence in preliminary examinations.

A preliminary hearing must comport with the requirements of due process,¹ and generally, due process of law requires adherence to the adopted and recognized rules of evidence in preliminary examinations.² The procedure in a state court in its preliminary hearing is a matter for state direction so long as the proceedings do not amount to such a gross unfairness as to violate a defendant's right to due process.³ The State may conduct such hearings informally provided the procedure employed does not operate to the prejudice of a defendant in the subsequent trial of his or her cause in such a way that it must be characterized as a violation of some fundamental principle of justice.⁴

Accordingly, due process does not require that an accused at a preliminary hearing be afforded the right to confront and cross-examine all of the witnesses against him or her⁵ or that the defendant be given the opportunity for limitless cross-examination for discovery purposes.⁶

Furthermore, due process does not ordinarily prohibit the use of hearsay evidence at a preliminary hearing to establish probable cause.⁷ Questions of credibility and weight of the evidence are appropriately determined at trial, and there is no due process requirement for a determination of these issues in the course of determining probable cause at a preliminary hearing.⁸

While due process requires that the magistrate be neutral and detached,⁹ the holding of a preliminary hearing or examination by a nonlawyer judge¹⁰ or justice of the peace¹¹ is not a denial of due process.

A preliminary examination given by a nonresident judge on the disqualification or absence of the resident judge satisfies the requirements of due process,¹² and it is not a denial of due process for a judge who has conducted a so-called one-person grand jury and issued the warrant to preside as the examining magistrate.¹³ There is no affirmative due process obligation to record testimony at a preliminary hearing merely because it may be of use to the defendant;¹⁴ therefore, the denial of a transcript of the preliminary hearing is not a denial of due process.¹⁵

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Footnotes

- 1 Okla.—*Beller v. State*, 1979 OK CR 64, 597 P.2d 338 (Okla. Crim. App. 1979).
Identity of informant
 That the court, following settled law, refused to compel police officers, at a preliminary hearing to determine probable cause for the arrest and search of the defendant, to divulge the identity of the informant who had informed the officers that the defendant was selling narcotics and had narcotics on his person, was not violative of the Due Process Clause.
 U.S.—*McCray v. State of Ill.*, 386 U.S. 300, 87 S. Ct. 1056, 18 L. Ed. 2d 62 (1967).
- 2 Cal.—*People v. Schuber*, 71 Cal. App. 2d 773, 163 P.2d 498 (3d Dist. 1945).
Preliminary examination sufficient to constitute due process
 N.M.—*State v. Melendrez*, 1945-NMSC-020, 49 N.M. 181, 159 P.2d 768 (1945).
- 3 U.S.—*Bird v. Peyton*, 287 F. Supp. 860 (W.D. Va. 1968).
Procedure affording full panoply of rights not required
 The Federal Constitution does not require a state to establish a procedure for the preliminary examination of probable cause that affords the defendant the full panoply of constitutional rights which are applicable at a criminal defendant's trial.
 Kan.—*State v. Leshay*, 289 Kan. 546, 213 P.3d 1071 (2009).
- 4 U.S.—*Burbey v. Burke*, 295 F. Supp. 1045 (E.D. Wis. 1969).
- 5 Miss.—*Shook v. State*, 552 So. 2d 841 (Miss. 1989).
 Wyo.—*Trujillo v. State*, 880 P.2d 575 (Wyo. 1994).
Rights granted by rule
 Rights to cross-examine prosecution witnesses and present witnesses on behalf of the defense at a preliminary hearing, like the right to the hearing itself, are granted by rule and are not a part of the constitutional right to due process.
 Mo.—*State v. Aaron*, 218 S.W.3d 501 (Mo. Ct. App. W.D. 2007).
- 6 Ariz.—*State v. Williams*, 27 Ariz. App. 279, 554 P.2d 646 (Div. 1 1976).
Opportunity for discovery
 While a preliminary hearing may provide some opportunity for discovery, constitutional due process does not mandate that opportunity.
 Wyo.—*Trujillo v. State*, 880 P.2d 575 (Wyo. 1994).
- 7 U.S.—*Peterson v. California*, 604 F.3d 1166 (9th Cir. 2010).
 Conn.—*State v. Just*, 185 Conn. 339, 441 A.2d 98 (1981).
 Wis.—*State v. O'Brien*, 2014 WI 54, 354 Wis. 2d 753, 850 N.W.2d 8 (2014), cert. denied, 135 S. Ct. 494, 190 L. Ed. 2d 362 (2014).
Use of codefendant's confession

- 8 Cal.—*People v. Miranda*, 23 Cal. 4th 340, 96 Cal. Rptr. 2d 758, 1 P.3d 73 (2000).
Wyo.—*Ortiz v. State*, 2014 WY 60, 326 P.3d 883 (Wyo. 2014).
9 U.S.—*Tucker v. City of Montgomery Bd. of Com'rs*, 410 F. Supp. 494 (M.D. Ala. 1976).
10 Kan.—*State v. Solem*, 220 Kan. 471, 552 P.2d 951 (1976).
Tenn.—*State v. Pritchett*, 621 S.W.2d 127 (Tenn. 1981).
11 Or.—*State v. Pfeiffer*, 25 Or. App. 45, 548 P.2d 174 (1976).
Utah—*State v. Beck*, 584 P.2d 870 (Utah 1978).
12 N.M.—*State v. Encinias*, 1949-NMSC-044, 53 N.M. 343, 208 P.2d 155 (1949).
13 Mich.—*People v. Hancock*, 326 Mich. 471, 40 N.W.2d 689 (1950), on reh'g, 328 Mich. 143, 43 N.W.2d 312 (1950).
14 U.S.—*Britt v. McKenney*, 529 F.2d 44 (1st Cir. 1976).
15 Ill.—*People v. Hanson*, 44 Ill. App. 3d 977, 3 Ill. Dec. 778, 359 N.E.2d 188 (3d Dist. 1977).
N.Y.—*People v. Pinion*, 56 A.D.2d 664, 392 N.Y.S.2d 53 (2d Dep't 1977).

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16C C.J.S. Constitutional Law § 1635

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

C. Preliminary Proceedings; Arrest or Detention; Bail; Summary Trial

§ 1635. Constitutional rights with respect to summary trial and conviction

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4602

Although a summary conviction constitutes no abuse of due process where the record discloses that a sufficient information has been read to the accused, he or she has pleaded not guilty, testimony sufficient to support the charge has been taken, and the accused has been found guilty, a person is convicted without due process where the proceedings are so summary and informal that there is a lack of accusation in due form, notice, and an opportunity to interpose any defense the accused may have.

A summary conviction constitutes no abuse of due process where the record discloses that a sufficient information has been read to the accused, he or she has pleaded not guilty to the charge, testimony sufficient to support the charge has been taken, and the accused has been found guilty.¹ A person is convicted without due process of law, however, where the proceedings are so summary and informal that there is a lack of accusation in due form, notice, and an opportunity to interpose any defense accused may have,² as where no written complaint is drawn until after all the testimony has been taken, the only information the accused has as to the charge against him or her is an indefinite and insufficient oral statement by the magistrate after considerable testimony has been taken, and the only testimony of the accused consists of answers to the magistrate's questions, really amounting to a cross-examination, and he or she is not allowed to testify to what might be a defense.³

In a bench trial, where there is an acquittal of one defendant and a conviction of another when the only evidence of culpability applies equally to both, the trial court should provide a statement of principled reasons for treating like defendants in an unlike fashion, and the conviction of the one defendant should be set aside as a deprivation without due process of that defendant's fundamental interest in liberty unless the court can articulate a rational basis for convicting that defendant while acquitting the other.⁴

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Footnotes

- 1 Pa.—[Com. ex rel. Jenkins v. Costello](#), 141 Pa. Super. 183, 14 A.2d 567 (1940).
- 2 Miss.—[Bramlette v. State](#), 193 Miss. 24, 8 So. 2d 234 (1942).
N.J.—[Application of Burke](#), 34 N.J. Super. 460, 112 A.2d 807 (County Ct. 1955).
Amendment of charge
Where at the conclusion of trial on a charge of sexual intercourse with a child, the court found the petitioner not guilty of the charged offense, but amended the charge and found the petitioner guilty of the misdemeanor of contributing to the delinquency of a minor, and the petitioner was not afforded notice of or a hearing on the charge of which he was summarily tried and convicted following acquittal of the felony accusation, and there was no showing of waiver of the right to notice of the new charge, the petitioner was deprived of due process.
U.S.—[LaFond v. Quatsoe](#), 325 F. Supp. 1010 (E.D. Wis. 1971).
- 3 N.Y.—[People v. Caralt](#), 135 Misc. 842, 241 N.Y.S. 641 (Spec. Sess. 1930).
- 4 U.S.—[U.S. v. Duz-Mor Diagnostic Laboratory, Inc.](#), 650 F.2d 223 (9th Cir. 1981).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

D. Indictment or Information; Arraignment and Plea

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A.L.R. Library

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A.L.R. Index, Jury Trials
A.L.R. Index, Plea Bargaining
A.L.R. Index, Pleas
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16C C.J.S. Constitutional Law § 1636

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

D. Indictment or Information; Arraignment and Plea

1. Indictment or Information

§ 1636. Constitutional rights with respect to indictments and informations, in general

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4528, 4573 to 4583, 4595

An indictment or presentment by a grand jury is essential to due process when a constitutional or statutory provision makes it a necessary step in the prosecution of an accused; however, it is not required by the Due Process Clause itself, and due process may be afforded by an information or an indictment when authorized by a constitutional provision, statute, or rule of criminal procedure not conflicting with a constitutional provision.

The substance of pleading to some extent is an element of due process of law,¹ and an indictment or presentment by a grand jury is essential to due process when an applicable constitutional or statutory provision makes it a necessary step in the prosecution of a person accused of a crime.² However, indictment by a grand jury is not required by a due process of law clause itself,³ nor is it requisite to due process in a state court by virtue of the Fifth Amendment to the Federal Constitution, which requires a presentment or indictment by a grand jury in certain cases, but applies only to the federal courts.⁴

When authorized by a constitutional provision, or by a statute or rule of criminal procedure not conflicting with a constitutional provision, due process of law may be afforded by an information⁵ or by a bill of indictment prepared in the usual form by the

district attorney.⁶ Moreover, the fact that the prosecution has been initiated by a grand jury indictment rather than by information does not violate a defendant's right to due process.⁷

An indictment based solely on hearsay evidence does not violate due process,⁸ and an information setting forth offenses not charged at a preliminary hearing but arising from the same transaction does not violate due process.⁹ In addition, prosecution on an information issued by the state's attorney on his or her oath of office alone without an accompanying affidavit, or a showing before a magistrate demonstrating the presence of facts constituting probable cause to charge the accused, is not a denial of due process.¹⁰ A statute requiring prosecutions thereunder to be commenced only on the attorney general's express direction is not unconstitutional as denying due process of law.¹¹

An accused has a due process right not to be indicted on the basis of false evidence, known to and uncorrected by the prosecutor,¹² and due process is violated by an indictment which the government knows is partially based upon perjured testimony that is material in nature.¹³ When the extent of incompetent and irrelevant evidence before a grand jury is such that, under instructions and advice given by the prosecutor, it is unreasonable to expect that the grand jury could limit its consideration to admissible, relevant evidence, the accused is denied due process, notwithstanding a statute permitting the grand jury to obtain exculpatory evidence.¹⁴

In the absence of prejudice to the accused, the obtaining of successive indictments because the preceding ones have been defective does not constitute a denial of due process,¹⁵ and it is not a denial of due process to obtain an indictment on the basis of the same evidence previously presented to a grand jury which has refused to indict.¹⁶ Furthermore, while it is not a denial of due process to charge an aider and abettor as a principal,¹⁷ it is a violation of due process of law to name a person as an unindicted coconspirator.¹⁸ The failure to take the accused before the grand jury is not a violation of constitutional provisions relating to due process of law.¹⁹

Failure to endorse name of witness.

A failure to endorse the name of a witness on the indictment may deprive an accused of due process.²⁰ However, due process is not denied where an accused fails to make a timely objection to such defect²¹ or where his or her counsel stipulates to a late endorsement of the state's witnesses.²²

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Footnotes

- 1 U.S.—*U.S. v. Williams*, 202 F.2d 712 (5th Cir. 1953).
- 2 Ala.—*Streanger v. State*, 21 Ala. App. 600, 110 So. 595 (1926).
La.—*State v. Harvey*, 159 La. 674, 106 So. 28 (1925).
- 3 U.S.—*Branzburg v. Hayes*, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972).
Mass.—*Lataille v. District Court of Eastern Hampden*, 366 Mass. 525, 320 N.E.2d 877 (1974).
Va.—*Muhammad v. Com.*, 269 Va. 451, 619 S.E.2d 16 (2005).
- 4 U.S.—*Alexander v. Louisiana*, 405 U.S. 625, 92 S. Ct. 1221, 31 L. Ed. 2d 536 (1972).
Colo.—*Losavio v. Robb*, 195 Colo. 533, 579 P.2d 1152 (1978).
N.J.—*State v. Porro*, 158 N.J. Super. 269, 385 A.2d 1258 (App. Div. 1978).
- 5 Colo.—*People v. Reliford*, 186 Colo. 6, 525 P.2d 467 (1974).
Neb.—*State v. Lehman*, 203 Neb. 341, 278 N.W.2d 610 (1979).
- 6 Pa.—*Com. ex rel. Withers v. Ashe*, 350 Pa. 493, 39 A.2d 610 (1944).

Alternative remedies

Prosecution by indictment and by information are alternative remedies available to the State, and the State commits no violation of the Fourteenth Amendment by electing one over the other.

Okla.—*Collins v. State*, 1977 OK CR 112, 561 P.2d 1373 (Okla. Crim. App. 1977).

U.S.—*U.S. v. Farries*, 328 F. Supp. 1034 (M.D. Pa. 1971), judgment aff'd, 459 F.2d 1057 (3d Cir. 1972).

Cal.—*People v. Harvey*, 76 Cal. App. 3d 441, 142 Cal. Rptr. 887 (2d Dist. 1978).

Nev.—*Gibson v. State*, 96 Nev. 48, 604 P.2d 814 (1980).

As to due process issues with regard to grand juries, see § 1639.

A.L.R. Library

Limitations on state prosecuting attorney's discretion to initiate prosecution by indictment or by information, 44 A.L.R.4th 401.

U.S.—*U.S. v. West*, 549 F.2d 545 (8th Cir. 1977).

Mo.—*State v. Tressler*, 503 S.W.2d 13 (Mo. 1973).

Ill.—*People v. Robinson*, 104 Ill. App. 3d 544, 60 Ill. Dec. 296, 432 N.E.2d 1195 (1st Dist. 1982).

Vt.—*State v. Crepeault*, 127 Vt. 465, 252 A.2d 534 (1969).

U.S.—*U.S. v. Bioff*, 40 F. Supp. 497 (S.D. N.Y. 1941).

N.M.—*State v. Reese*, 91 N.M. 76, 1977-NMCA-112, 570 P.2d 614 (Ct. App. 1977).

U.S.—*U.S. v. Traylor*, 656 F.2d 1326, 9 Fed. R. Evid. Serv. 219 (9th Cir. 1981).

Fla.—*Anderson v. State*, 574 So. 2d 87 (Fla. 1991).

Ill.—*People v. DiVincenzo*, 183 Ill. 2d 239, 233 Ill. Dec. 273, 700 N.E.2d 981 (1998).

Police officer's false testimony before grand jury

N.M.—*State v. Reese*, 91 N.M. 76, 1977-NMCA-112, 570 P.2d 614 (Ct. App. 1977).

Cal.—*People v. Backus*, 23 Cal. 3d 360, 152 Cal. Rptr. 710, 590 P.2d 837 (1979).

Md.—*Greathouse v. State*, 5 Md. App. 675, 249 A.2d 207 (1969) (overruled on other grounds by, *Stewart v. State*, 282 Md. 557, 386 A.2d 1206 (1978)).

Ariz.—*State v. Tovar*, 128 Ariz. 551, 627 P.2d 702 (Ct. App. Div. 1 1980).

Mich.—*People v. Bills*, 53 Mich. App. 339, 220 N.W.2d 101 (1974).

U.S.—*Application of Jordan*, 439 F. Supp. 199 (S.D. W. Va. 1977).

Ind.—*Sisk v. State*, 232 Ind. 214, 110 N.E.2d 627 (1953).

Mich.—*People v. Manns*, 12 Mich. App. 543, 163 N.W.2d 232 (1968).

Minn.—*State v. Drews*, 274 Minn. 426, 144 N.W.2d 251 (1966).

U.S.—*Winckler v. Solem*, 688 F.2d 594 (8th Cir. 1982).

16C C.J.S. Constitutional Law § 1637

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

D. Indictment or Information; Arraignment and Plea

1. Indictment or Information

§ 1637. Constitutional rights with respect to reindictment and the refiling of charges

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4528, 4573 to 4583, 4595

A vindictive reindictment by the grand jury as the result of action by the prosecutor may violate due process.

A prosecutor's discretion to reindict a defendant is limited by the Due Process Clause.¹ Accordingly, the vindictive reindictment of an accused at the instance of the prosecutor may violate due process² though a new indictment does not necessarily violate due process.³ A reindictment increasing the severity of the charges following the exercise of constitutional or statutory rights creates an appearance of vindictiveness which, if not dispelled by the government, constitutes a due process violation.⁴ To rebut the appearance of vindictiveness, it must be shown that the decision to reindict with more severe charges is justified by independent reasons or intervening circumstances which dispel such appearance.⁵

A due process violation in the reindictment of an accused because of his or her exercise of some procedural right does not arise from the possibility that the accused might be deterred from exercising a procedural right but rather stems from the danger that the State might retaliate against the accused for some action lawfully attacking his or her conviction.⁶ However, prosecutorial

vindictiveness in reindicting an accused will not be found where the charges contained in the second indictment expose the accused to no greater risk of punishment than did those contained in the first indictment.⁷

A prosecutor's decision, following a mistrial, to reformulate charges to increase the chance of conviction, which decision does not increase the severity of the charges, does not amount to penalizing the accused for the exercise of his or her procedural rights in violation of due process.⁸ Furthermore, it is not a denial of due process for the State to enter a nolle prosequi in a case in the absence of sufficient evidence to support a conviction and then to obtain a new indictment when there is sufficient evidence.⁹

Refiling of charges.

While a subsequent refiling of the charges against an accused, after dismissal of the indictment, may not constitute a denial of due process,¹⁰ a refiling of an indictment without cause may constitute harassment of an accused in violation of due process of law.¹¹ In fact, when potentially abusive practices are involved, the presumption is that due process will bar the refiling of charges.¹²

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Footnotes

- 1 U.S.—*Blackledge v. Perry*, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974).
- 2 U.S.—*U.S. v. Grady*, 544 F.2d 598, 1 Fed. R. Evid. Serv. 408, 37 A.L.R. Fed. 819 (2d Cir. 1976).
As to prosecutorial vindictiveness with regard to due process concerns, generally, see § 1613.
Vindictiveness not shown
Where a prosecutor's statement during plea negotiations that if the defendant did not plead guilty to the original one-count indictment he would be reindicted and a new count added was factual, and there was no retaliatory motivation on the part of the government, which admittedly procured a new indictment with the additional count when the defendant did not plead guilty to the original indictment; the case was the functional equivalent of normal plea bargaining and did not demonstrate prosecutorial vindictiveness resulting in denial of due process.
U.S.—*U.S. v. Vaughan*, 565 F.2d 283 (4th Cir. 1977).
- 3 U.S.—*U.S. v. Guillelte*, 547 F.2d 743, 1 Fed. R. Evid. Serv. 486 (2d Cir. 1976).
Reindictment prior to arraignment
A prosecutor may withdraw the initial charges filed against a defendant and reindict on more severe charges, prior to the defendant's arraignment, without engaging in vindictive prosecution in violation of the defendant's due process rights.
U.S.—*U.S. v. Williams*, 47 F.3d 658 (4th Cir. 1995).
- 4 U.S.—*U.S. v. Motley*, 655 F.2d 186 (9th Cir. 1981).
Reindictment for first-degree murder
In light of the inherent potential for prosecutorial vindictiveness in such a case, the reindictment of a defendant for first-degree attempted murder, which followed a mistrial on lesser charges arising out of the same circumstances, and which resulted only from a reassessment of the circumstances by the attorney general, violated the defendant's right to due process of law.
Del.—*Johnson v. State*, 396 A.2d 163 (Del. 1978).
- 5 U.S.—*U.S. v. Motley*, 655 F.2d 186 (9th Cir. 1981).
Newly discovered evidence
U.S.—*U.S. v. Jones*, 587 F.2d 802, 4 Fed. R. Evid. Serv. 172 (5th Cir. 1979).
- 6 U.S.—*U.S. v. Ruppel*, 666 F.2d 261, 9 Fed. R. Evid. Serv. 1170 (5th Cir. 1982); *U.S. v. Kendrick*, 682 F.3d 974, 88 Fed. R. Evid. Serv. 790 (11th Cir. 2012).
- 7 U.S.—*U.S. v. Rosales-Lopez*, 617 F.2d 1349 (9th Cir. 1980), judgment aff'd, 451 U.S. 182, 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981).
Original indictment as faulty

- 8 Tex.—*Lyles v. State*, 582 S.W.2d 138 (Tex. Crim. App. 1979).
U.S.—*U.S. v. Motley*, 655 F.2d 186 (9th Cir. 1981).
- 9 La.—*State v. Daigle*, 344 So. 2d 1380 (La. 1977).
Md.—*Brady v. State*, 36 Md. App. 283, 374 A.2d 613 (1977).
- 10 Iowa—*State v. Moritz*, 293 N.W.2d 235 (Iowa 1980).
Okla.—*Bristow v. State*, 1982 OK CR 49, 644 P.2d 118 (Okla. Crim. App. 1982).
After dismissal due to nonappearance of State's witnesses
Okla.—*Lampe v. State*, 1975 OK CR 166, 540 P.2d 590 (Okla. Crim. App. 1975).
- 11 Idaho—*State v. Bacon*, 117 Idaho 679, 791 P.2d 429 (1990).
Okla.—*Still v. Dalton*, 1981 OK CR 6, 624 P.2d 76 (Okla. Crim. App. 1981) (overruled on other grounds
by, *State v. Hammond*, 1989 OK CR 25, 775 P.2d 826 (Okla. Crim. App. 1989)).
- 12 Utah—*State v. Morgan*, 2001 UT 87, 34 P.3d 767 (Utah 2001).

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16C C.J.S. Constitutional Law § 1638

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

D. Indictment or Information; Arraignment and Plea

1. Indictment or Information

§ 1638. Constitutional rights with respect to preindictment delays

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4528, 4573 to 4583, 4595

A preindictment delay which is unreasonable, inordinate, or oppressive, coupled with prejudice to the accused, may constitute a violation of due process.

The right to be free of prejudicial preindictment delay is based on Due Process Clauses in state and federal constitutions and not on the Sixth Amendment right to a speedy trial.¹ The due process requirement of a prompt prosecution is broader than the right to a speedy trial² and though it does not permit the courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment, it has a limited role in protecting an accused against an oppressive delay.³

Generally, the applicable statute of limitations is the primary protection against a denial of due process caused by delay between the date of the offense and the date of the lodging of a formal complaint,⁴ and so long as the applicable statute of limitations is observed, delay of an indictment, without more, does not constitute a denial of due process.⁵ Under certain circumstances, however, an accused may be deprived of due process where the lapse of time between the alleged commission of the offense and the filing of the accusation makes it difficult or impossible for him or her to prepare a defense.⁶

Preindictment delay which is unreasonable, inordinate, or oppressive, coupled with prejudice to the accused, may constitute a violation of due process⁷ even if the indictment is obtained within the applicable period of limitations and the trial on the indictment is had with dispatch.⁸ More particularly, preindictment delay can violate due process even where the accused has not been arrested or otherwise accused before the indictment.⁹

Preindictment delay which is an intentional device to gain a tactical advantage over an accused, particularly where substantial prejudice to the accused's right to a fair trial results, constitutes a denial of due process.¹⁰ The mere passage of time is insufficient to support a due process claim for preindictment delay even if the time lapse prejudiced the defense.¹¹ Dimmed or faulty memories¹² or the unavailability of a witness¹³ do not constitute substantial prejudice in this respect. Similarly, the mere fact that an accused's parole is affected,¹⁴ or that he or she is charged after turning 18 years old for a crime committed when he or she is a minor,¹⁵ or that he or she has lost the right to concurrent sentencing,¹⁶ does not constitute sufficient prejudice to establish a denial of due process.

A determination made in good faith to delay prosecution for sufficient reasons will not deprive a defendant of due process even though there may be some prejudice to the defendant.¹⁷ Thus, the prosecution of an accused following preindictment investigative delay, which is fundamentally unlike delay undertaken solely to gain tactical advantage over an accused, does not deprive him or her of due process, even if a defense might have been somewhat prejudiced by the lapse of time.¹⁸ Preindictment delay by the prosecution to gather potentially exculpatory evidence is not an unreasonable delay denying due process,¹⁹ and where preindictment delay is due to the need to discover the offender and to gather sufficient evidence to secure an indictment, there is no due process deprivation.²⁰

Particular applications.

In determining whether preindictment delay violates due process, each case must be decided on its own facts.²¹ Accordingly, in the light of the foregoing principles and based on the facts and circumstances of the particular cases, various specific periods of preindictment delay have been deemed not violative of due process, such as periods between one and six months,²² seven months and one year,²³ one and three years,²⁴ and periods exceeding three years.²⁵

Showing required.

To prove that due process has been violated by a preindictment delay, an accused must show that there is actual or substantial prejudice to his or her right to a fair trial, and that the delay is an intentional device to gain a tactical advantage over the accused,²⁶ or that the delay has been undertaken for some other impermissible, bad-faith purpose.²⁷ The proof must be definite and not speculative.²⁸ It is not enough to show that the prosecution could have proceeded more rapidly or that at some time during the period of delay an additional investigation was taking place.²⁹

The mere possibility of prejudice resulting from a preindictment delay is not sufficient to deprive an accused of due process,³⁰ and only prejudice that affects the conduct of the defense may be found violative of due process.³¹ Furthermore, generally, proof of actual prejudice is a necessary but not a sufficient element of a due process claim concerning preindictment delay;³² intentional or negligent misconduct on the government's part must also be shown.³³

CUMULATIVE SUPPLEMENT

Cases:

Due Process Clause plays a limited role in guarding against oppressive preaccusation delay; court must dismiss a prosecution where compelling the defendant to stand trial, even though the statute of limitations has not yet run, would violate those fundamental conceptions of justice that lie at the base of civil and political institutions and that define the community's sense of fair play and decency. (Per McKinnon, J., with one justice concurring and three justices concurring in the result.) [U.S. Const. Amend. 14](#). [State v. Laird](#), 2019 MT 198, 447 P.3d 416 (Mont. 2019).

Trial court was required to conduct an actual prejudice analysis before denying defendant's motion to dismiss alleging that 28-year delay between alleged murder and indictment violated due process; trial court found that the delay was justified because the state brought the charge based on at least some new evidence, but failed to address whether defendant suffered any actual prejudice as a result of the pre-indictment delay. [U.S. Const. Amend. 14](#); [Ohio Const. art. 1, § 16](#). [State v. Purk](#), 2017-Ohio-7381, 96 N.E.3d 1032 (Ohio Ct. App. 9th Dist. Summit County 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[U.S. v. MacDonald](#), 456 U.S. 1, 102 S. Ct. 1497, 71 L. Ed. 2d 696 (1982).
Ind.—[State v. Azania](#), 865 N.E.2d 994 (Ind. 2007), decision clarified on reh'g, 875 N.E.2d 701 (Ind. 2007).
N.M.—[State v. Parrish](#), 149 N.M. 506, 2011-NMCA-033, 252 P.3d 730 (Ct. App. 2011).
W. Va.—[State v. Jessie](#), 225 W. Va. 21, 689 S.E.2d 21 (2009).
Same considerations
The same considerations applicable in the context of a speedy trial claim are applicable to a claimed due process violation based on delays in proceedings.
Pa.—[Com. v. Pounds](#), 490 Pa. 621, 417 A.2d 597 (1980).
A.L.R. Library
[Application of speedy trial statute to dismissal or other termination of prior indictment or information and bringing of new indictment or information](#), 39 A.L.R.4th 899.
- 2 Iowa—[State v. Harriman](#), 513 N.W.2d 725 (Iowa 1994).
N.Y.—[People v. Singer](#), 44 N.Y.2d 241, 405 N.Y.S.2d 17, 376 N.E.2d 179 (1978).
- 3 U.S.—[U. S. v. Lovasco](#), 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977).
Mo.—[State v. Davis](#), 585 S.W.2d 60 (Mo. Ct. App. W.D. 1979).
Due process plays limited role in protecting against oppressive delay
U.S.—[U.S. v. DeCologero](#), 530 F.3d 36 (1st Cir. 2008); [U.S. v. Avelar-Castro](#), 27 F. Supp. 3d 686 (E.D. La. 2014).
Ala.—[Craft v. State](#), 90 So. 3d 197 (Ala. Crim. App. 2011).
- 4 U.S.—[U. S. v. Lovasco](#), 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977).
Pa.—[Com. v. Loudon](#), 569 Pa. 245, 803 A.2d 1181 (2002).
Tenn.—[State v. Carico](#), 968 S.W.2d 280 (Tenn. 1998).
A.L.R. Library
[Finding or return of indictment, or filing of information, as tolling limitation period](#), 18 A.L.R.4th 1202.
- 5 U.S.—[U.S. v. Skillman](#), 442 F.2d 542 (8th Cir. 1971).
Censure
Laggardness in prosecuting a criminal charge rightfully exposes the government to censure, but not every delay is of constitutional moment.
U.S.—[U.S. v. MacDonald](#), 688 F.2d 224, 11 Fed. R. Evid. Serv. 474 (4th Cir. 1982).

- 6 Cal.—*People v. Sanford*, 63 Cal. App. 3d 952, 134 Cal. Rptr. 155 (1st Dist. 1976).
Haw.—*State v. Dunphy*, 71 Haw. 537, 797 P.2d 1312 (1990).
- 7 U.S.—*U.S. v. Hood*, 593 F.2d 293 (8th Cir. 1979).
Ill.—*People v. Gulley*, 83 Ill. App. 3d 1066, 39 Ill. Dec. 486, 404 N.E.2d 1077 (3d Dist. 1980).
N.Y.—*People v. Singer*, 44 N.Y.2d 241, 405 N.Y.S.2d 17, 376 N.E.2d 179 (1978).
- 8 U.S.—*U.S. v. Corona-Verbera*, 509 F.3d 1105 (9th Cir. 2007); *U. S. v. Moore*, 515 F. Supp. 509 (S.D. Ohio 1981).
W. Va.—*State v. Hinchman*, 214 W. Va. 624, 591 S.E.2d 182 (2003).
- 9 U.S.—*U.S. v. Brand*, 556 F.2d 1312 (5th Cir. 1977).
- 10 Ga.—*Henderson v. State*, 272 Ga. 621, 532 S.E.2d 398 (2000).
Ky.—*Graham v. Com.*, 319 S.W.3d 331 (Ky. 2010), as modified, (Sept. 10, 2010).
Mass.—*Burton v. Com.*, 432 Mass. 1008, 732 N.E.2d 283 (2000).
W. Va.—*State v. Hinchman*, 214 W. Va. 624, 591 S.E.2d 182 (2003).
- 11 U.S.—*U.S. v. Seale*, 600 F.3d 473, 81 Fed. R. Evid. Serv. 905 (5th Cir. 2010).
- 12 U.S.—*U.S. v. Gulley*, 526 F.3d 809 (5th Cir. 2008).
Haw.—*State v. Crail*, 97 Haw. 170, 35 P.3d 197 (2001).
Iowa.—*State v. Brown*, 656 N.W.2d 355 (Iowa 2003).
- 13 U.S.—*U.S. v. DeCologero*, 530 F.3d 36 (1st Cir. 2008); *U.S. v. Gulley*, 526 F.3d 809 (5th Cir. 2008).
Haw.—*State v. Crail*, 97 Haw. 170, 35 P.3d 197 (2001).
Mont.—*State v. Taylor*, 1998 MT 121, 289 Mont. 63, 960 P.2d 773 (1998).
- 14 U.S.—*U.S. v. Ricketson*, 498 F.2d 367 (7th Cir. 1974) (rejected on other grounds by, *U.S. v. Sorrell*, 413 F. Supp. 138 (E.D. Pa. 1976)).
Haw.—*State v. Higa*, 102 Haw. 183, 74 P.3d 6 (2003).
- 15 Wash.—*State v. Salavea*, 151 Wash. 2d 133, 86 P.3d 125 (2004) (holding modified on other grounds by, *State v. Oppelt*, 172 Wash. 2d 285, 257 P.3d 653 (2011)).
- 16 Haw.—*State v. Higa*, 102 Haw. 183, 74 P.3d 6 (2003).
Nev.—*Jones v. State*, 96 Nev. 240, 607 P.2d 116 (1980).
- 17 U.S.—*Bierenbaum v. Graham*, 607 F.3d 36 (2d Cir. 2010).
Commencement deferred for further investigation or other reasons
N.Y.—*People v. Stevens*, 95 A.D.3d 1451, 944 N.Y.S.2d 343 (3d Dep't 2012).
- 18 U.S.—*U. S. v. Lovasco*, 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977).
Okla.—*Garrison v. State*, 2004 OK CR 35, 103 P.3d 590 (Okla. Crim. App. 2004).
- 19 Alaska.—*Burke v. State*, 624 P.2d 1240 (Alaska 1980).
- 20 Ga.—*Roebuck v. State*, 277 Ga. 200, 586 S.E.2d 651 (2003).
Tex.—*Ibarra v. State*, 11 S.W.3d 189 (Tex. Crim. App. 1999).
- 21 U.S.—*U.S. v. Helmich*, 521 F. Supp. 1246 (M.D. Fla. 1981), judgment aff'd, 704 F.2d 547 (11th Cir. 1983).
Md.—*King v. State*, 6 Md. App. 413, 251 A.2d 628 (1969).
- 22 U.S.—*U.S. v. McManaman*, 606 F.2d 919, 5 Fed. R. Evid. Serv. 116 (10th Cir. 1979).
D.C.—*Dickerson v. U.S.*, 650 A.2d 680 (D.C. 1994).
Fla.—*Rivera v. State*, 717 So. 2d 477 (Fla. 1998).
- 23 U.S.—*U.S. v. Boles*, 684 F.2d 534 (8th Cir. 1982).
D.C.—*U.S. v. Day*, 697 A.2d 31 (D.C. 1997).
Miss.—*Stack v. State*, 860 So. 2d 687 (Miss. 2003).
- 24 D.C.—*Givens v. U.S.*, 644 A.2d 1373 (D.C. 1994).
Haw.—*State v. Crail*, 97 Haw. 170, 35 P.3d 197 (2001).
- 25 Fla.—*Evans v. State*, 808 So. 2d 92 (Fla. 2001).
Md.—*Clark v. State*, 364 Md. 611, 774 A.2d 1136 (2001).
Mass.—*Com. v. George*, 430 Mass. 276, 717 N.E.2d 1285 (1999).
- 26 U.S.—*U.S. v. Ramos-Gonzalez*, 775 F.3d 483 (1st Cir. 2015); *U.S. v. Shealey*, 641 F.3d 627 (4th Cir. 2011);
U.S. v. Madden, 682 F.3d 920 (10th Cir. 2012).
Ariz.—*State v. Romero*, 236 Ariz. 451, 341 P.3d 493 (Ct. App. Div. 2 2014).
Conn.—*State v. Roger B.*, 297 Conn. 607, 999 A.2d 752 (2010).
Ill.—*People v. Totzke*, 2012 IL App (2d) 110823, 362 Ill. Dec. 887, 974 N.E.2d 408 (App. Ct. 2d Dist. 2012).

Neb.—*State v. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013).

Prejudice not presumed

Cal.—*People v. Abel*, 53 Cal. 4th 891, 138 Cal. Rptr. 3d 547, 271 P.3d 1040 (2012).

Requires more than inconvenience

U.S.—*U.S. v. Irizarry-Colon*, 820 F. Supp. 2d 306 (D.P.R. 2011).

Heavy burden

A defendant claiming that preindictment delay resulted in a violation of the Due Process Clause carries a heavy burden.

U.S.—*U.S. v. Elsbery*, 602 F.2d 1054 (2d Cir. 1979).

Balancing test

In determining whether preindictment delay violates due process, the initial burden is on the defendant to show that actual prejudice has resulted from the delay, and once that showing has been made, the trial court must then balance the resulting prejudice against the reasonableness of the delay with the core inquiry being whether the government's decision to prosecute after substantial delay violates fundamental notions of justice or the community's sense of fair play.

Or.—*State v. Stokes*, 350 Or. 44, 248 P.3d 953 (2011).

W. Va.—*State v. Poore*, 226 W. Va. 727, 704 S.E.2d 727 (2010).

U.S.—*U.S. v. Crouch*, 84 F.3d 1497 (5th Cir. 1996).

U.S.—*U.S. v. Shealey*, 641 F.3d 627 (4th Cir. 2011); *U.S. v. Madden*, 682 F.3d 920 (10th Cir. 2012).

Ala.—*Craft v. State*, 90 So. 3d 197 (Ala. Crim. App. 2011).

Idaho—*State v. Kruse*, 100 Idaho 877, 606 P.2d 981 (1980).

Demonstration required

On a claim alleging violation of due process based on preaccusation delay, mere speculation about the loss of favorable evidence is insufficient to support a claim of prejudice; if a defendant claims prejudice because a certain document or a previously available witness is now missing or unavailable, the defendant must provide the expected content of the document or the witness's testimony and indicate how that document or witness would have aided the defense.

Utah—*State v. Hales*, 2007 UT 14, 152 P.3d 321 (Utah 2007).

Evidence unobtainable from other sources

To establish prejudice resulting from an intentional delay caused by the prosecution, as would violate due process, the defendant must offer more than mere speculation of lost witnesses, faded memories or misplaced documents; he or she must show an actual loss of evidence that would have aided the defense and that cannot be obtained from other sources.

U.S.—*U.S. v. Gulley*, 526 F.3d 809 (5th Cir. 2008).

U.S.—*U.S. v. Mills*, 641 F.2d 785 (9th Cir. 1981).

Ill.—*People v. Park*, 81 Ill. App. 3d 108, 36 Ill. Dec. 386, 400 N.E.2d 966 (3d Dist. 1980).

N.D.—*State v. Denny*, 350 N.W.2d 25 (N.D. 1984).

Anxiety does not constitute actual prejudice

Mont.—*State v. Burt*, 2000 MT 115, 299 Mont. 412, 3 P.3d 597 (2000).

Mass.—*Com. v. Imbruglia*, 377 Mass. 682, 387 N.E.2d 559 (1979).

U.S.—*U. S. v. Lovasco*, 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977).

Mont.—*State v. Wright*, 2000 MT 322, 302 Mont. 527, 17 P.3d 982 (2000).

U.S.—*U.S. v. Crouch*, 84 F.3d 1497 (5th Cir. 1996).

Mass.—*Com. v. George*, 430 Mass. 276, 717 N.E.2d 1285 (1999).

Balancing test

When a defendant alleges a violation of due process based on preindictment delay, the court must employ a balancing test, considering actual substantial prejudice to the defendant against the reasons asserted for the delay.

Haw.—*State v. Keliheleua*, 105 Haw. 174, 95 P.3d 605 (2004), as corrected, (Aug. 16, 2004).

16C C.J.S. Constitutional Law § 1639

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

D. Indictment or Information; Arraignment and Plea

1. Indictment or Information

§ 1639. Constitutional rights with respect to grand jury matters

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4528, 4573 to 4583, 4595

Proceeding by way of grand jury is not required of states by due process of law, but if a state resorts to a grand jury procedure, due process requires the utilization of an unbiased, unprejudiced, or impartial grand jury.

Although the Fifth Amendment requires a grand jury in the context of federal prosecutions, that requirement has not been made applicable to the states by incorporation under the Fourteenth Amendment.¹ However, if a state resorts to a grand jury procedure, due process requires the utilization of an unbiased, unprejudiced, or impartial grand jury.² The grand jury does not have the power to proceed without regard to due process.³ Moreover, due process requires that the grand jury must be able to make its determinations unburdened by external influences.⁴

Due process is denied where the grand jury is overreached or deceived in some significant way.⁵ A prosecutor's deception need not be intentional in order for presentation of deceptive or inaccurate evidence to a grand jury to violate a defendant's due process rights.⁶ Due process is likewise violated by a prosecutor engaging in conduct that invades the province of the grand

jury,⁷ or inducing action other than that which the grand jurors in their uninfluenced judgment would take,⁸ and misconduct which is not likely to have that effect does not deny due process.⁹

The failure of the prosecution to present exculpatory evidence to the grand jury does not necessarily violate the target's due process right to a fair trial or require a per se dismissal of the indictment.¹⁰ A grand juror's knowledge of an accused's prior bad acts does not necessarily imply bias so as to deny the accused due process of law.¹¹ A procedure allowing the substitution of a grand juror during the course of the proceedings does not deny the accused the right to due process where replacement jurors are sufficiently informed of the evidence already presented.¹² Due process mandates that a grand jury should only issue an indictment based on legal evidence rather than suspicion or conjecture.¹³ However, the presentation of evidence subsequently ruled inadmissible at the trial to a grand jury does not deny due process of law.¹⁴ Due process rights are not violated by the failure of the grand jury to keep minutes of its proceedings.¹⁵

Various other matters relating to the grand jury and its proceedings have been considered not to be violative of due process of law, such as the State's failure to bring its principal witness before the grand jury,¹⁶ permitting the presence of additional persons in the grand jury proceeding,¹⁷ having grand jurors submit their questions to the prosecutor for the prosecutor to pose to the witnesses,¹⁸ permitting the defendant to recant his or her grand jury testimony, without warning him or her that such recantation will be to no avail because the government intends to prosecute him or her for perjury regardless whether he or she recants,¹⁹ presenting the grand jury with a transcript of the defendant's testimony at prior grand jury proceedings,²⁰ and requiring that attorneys present in a grand jury room take an oath of secrecy.²¹

Witnesses.

While requiring an acquitted witness to testify with immunity before a grand jury is not a denial of due process,²² a grand jury witness is denied due process where he or she is held in contempt for refusing to answer questions that have been excepted from immunity granted to the witness.²³ There is no due process requirement that the government warn a grand jury witness that he or she is a target of a grand jury's investigation or to inform such witness of his or her statutory right to recant.²⁴

Due process does not give rise to the right to refuse to comply with a subpoena simply because the witness believes that the grand jury already has the information requested²⁵ or to the right of allocution with respect to the issuance of a civil contempt order against him or her.²⁶ A grand jury witness is not denied due process on the ground that he or she has been lured to the courthouse on some pretext where his or her appearance before the grand jury is wholly voluntary, and the witness is warned of his or her rights before he or she actually testifies.²⁷ The duty of a witness before a grand jury to give testimony is a continuing one that can be enforced consistent with due process by confinement until the contemnor purges him- or herself or until the term of the grand jury expires.²⁸

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Footnotes

- 1 U.S.—*Rhea v. Jones*, 622 F. Supp. 2d 562 (W.D. Mich. 2008); *Dilworth v. Markle*, 970 F. Supp. 2d 498 (N.D. W. Va. 2013).
Idaho—*Warren v. Craven*, 152 Idaho 327, 271 P.3d 725 (Ct. App. 2012).
Kan.—*State v. Reyna*, 290 Kan. 666, 234 P.3d 761 (2010).
Ky.—*Partin v. Com.*, 168 S.W.3d 23 (Ky. 2005).
Haw.—*State v. Jess*, 117 Haw. 381, 184 P.3d 133 (2008), as corrected, (Apr. 4, 2008).

Abolition

Due process does not require a state to adopt a grand jury system, and a state may abolish grand juries without violating the Fourteenth Amendment.

N.J.—*State v. Smith*, 102 N.J. Super. 325, 246 A.2d 35 (Law Div. 1968), *aff'd*, 55 N.J. 476, 262 A.2d 868 (1970).

Ariz.—*Franzi v. Superior Court of Arizona In and For Pima County*, 139 Ariz. 556, 679 P.2d 1043 (1984).

Haw.—*State v. Rodrigues*, 63 Haw. 412, 629 P.2d 1111 (1981).

R.I.—*State v. Jenison*, 122 R.I. 142, 405 A.2d 3 (1979).

Due process and statutory requirements

When prosecutors elect to pursue an indictment before a grand jury, they must comply with the requirement of due process and the statutory requirements governing grand jury proceedings.

Ind.—*Wurster v. State*, 715 N.E.2d 341 (Ind. 1999).

U.S.—*U.S. v. Briggs*, 514 F.2d 794, 28 A.L.R. Fed. 831 (5th Cir. 1975).

Ill.—*People v. Sears*, 49 Ill. 2d 14, 273 N.E.2d 380, 52 A.L.R.3d 1300 (1971).

Interest of target

The target of a grand jury investigation has a significant liberty interest at stake and is entitled to due process protection.

Kan.—*State v. Turner*, 300 Kan. 662, 333 P.3d 155 (2014).

Haw.—*State v. Pacific Concrete & Rock Co., Ltd.*, 57 Haw. 574, 560 P.2d 1309 (1977).

Ill.—*People v. DiVincenzo*, 183 Ill. 2d 239, 233 Ill. Dec. 273, 700 N.E.2d 981 (1998).

Ill.—*People v. Legore*, 2013 IL App (2d) 111038, 374 Ill. Dec. 701, 996 N.E.2d 148 (App. Ct. 2d Dist. 2013).

Haw.—*State v. Melear*, 63 Haw. 488, 630 P.2d 619 (1981).

Haw.—*State v. Melear*, 63 Haw. 488, 630 P.2d 619 (1981).

Iowa.—*State v. Paulsen*, 286 N.W.2d 157 (Iowa 1979).

U.S.—*U.S. v. Bettencourt*, 614 F.2d 214, 5 Fed. R. Evid. Serv. 976 (9th Cir. 1980).

Ind.—*Wurster v. State*, 715 N.E.2d 341 (Ind. 1999).

Iowa.—*State v. Paulsen*, 286 N.W.2d 157 (Iowa 1979).

Actual and substantial prejudice

Prosecutorial misconduct resulting in a due process violation during a grand jury proceeding is actually and substantially prejudicial only if the grand jury would not have otherwise indicted the defendant.

Ill.—*People v. Legore*, 2013 IL App (2d) 111038, 374 Ill. Dec. 701, 996 N.E.2d 148 (App. Ct. 2d Dist. 2013).

N.M.—*Buzbee v. Donnelly*, 1981-NMSC-097, 96 N.M. 692, 634 P.2d 1244 (1981).

Grand jury is an accusatory rather than an adjudicatory body

U.S.—*Harris v. Ruthenberg*, 2014 WL 3834810 (N.D. Ill. 2014).

Ariz.—*State v. Emery*, 131 Ariz. 493, 642 P.2d 838 (1982).

U.S.—*U.S. v. Lang*, 644 F.2d 1232 (7th Cir. 1981).

A.L.R. Library

Validity of indictment as affected by substitution or addition of grand jurors after commencement of investigation, 2 A.L.R.4th 980.

Kan.—*State v. Turner*, 300 Kan. 662, 333 P.3d 155 (2014).

U.S.—*Turner v. Lynch*, 534 F. Supp. 686 (S.D. N.Y. 1982).

N.M.—*Maldonado v. State*, 1979-NMSC-102, 93 N.M. 670, 604 P.2d 363 (1979).

U.S.—*U.S. v. Arradondo*, 483 F.2d 980, 25 A.L.R. Fed. 715 (8th Cir. 1973).

Mo.—*State v. Shives*, 601 S.W.2d 22 (Mo. Ct. App. W.D. 1980).

N.H.—*State v. Booton*, 114 N.H. 750, 329 A.2d 376 (1974).

Ill.—*People v. Sawyer*, 48 Ill. 2d 127, 268 N.E.2d 689 (1971).

Fla.—*White v. Dugger*, 565 So. 2d 700 (Fla. 1990).

A.L.R. Library

Presence of unauthorized persons during state grand jury proceedings as affecting indictment, 23 A.L.R.4th 397.

Ind.—*Wurster v. State*, 715 N.E.2d 341 (Ind. 1999).

U.S.—*U.S. v. Scrimgeour*, 636 F.2d 1019 (5th Cir. 1981).

Ill.—*People v. Jackson*, 64 Ill. App. 3d 307, 21 Ill. Dec. 238, 381 N.E.2d 316 (4th Dist. 1978).

- 21 Colo.—*People ex rel. Losavio v. J. L.*, 195 Colo. 494, 580 P.2d 23 (1978).
22 U.S.—*In re Bonk*, 527 F.2d 120 (7th Cir. 1975).
23 U.S.—*Bursey v. U. S.*, 466 F.2d 1059 (9th Cir. 1972).
24 U.S.—*U.S. v. Scrimgeour*, 636 F.2d 1019 (5th Cir. 1981).
25 Ill.—*Matter of Swan*, 92 Ill. App. 3d 856, 48 Ill. Dec. 70, 415 N.E.2d 1354 (2d Dist. 1981).
26 U.S.—*In re Rosahn*, 671 F.2d 690 (2d Cir. 1982).
27 La.—*U.S. v. Denison*, 663 F.2d 611, 65 A.L.R. Fed. 165 (5th Cir. 1981).
28 U.S.—*U. S. ex rel. Zevin v. Kreuger*, 301 F. Supp. 1123 (E.D. N.Y. 1969).

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

D. Indictment or Information; Arraignment and Plea

1. Indictment or Information

§ 1640. Constitutional rights with respect to grand jury matters—Selection and composition

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4528, 4573 to 4583, 4595

Where an indictment by a grand jury is required, in order to constitute due process, the indictment must be presented by a legal grand jury.

Where an indictment by a grand jury is required, in order to constitute due process, the indictment must be presented by a legal grand jury.¹ An indictment returned by a legally constituted and unbiased grand jury is enough, if valid on its face, to satisfy due process requirements.²

Due process precludes the selection of a grand jury in an arbitrary and discriminatory manner regardless of any showing of actual bias.³ Systematic and purposeful exclusion of a class of persons in the community from a grand jury,⁴ as well as the arbitrary exclusion of persons on account of race,⁵ is a denial of due process to persons indicted by that grand jury, though this rule regarding systematic exclusion applies only to the exclusion of members of an identifiable group.⁶ Although purposeful discrimination against racial minorities or women in the selection of federal grand jury forepersons is forbidden by the Fifth Amendment, it is not every discrimination in this respect that requires the invalidation of an indictment on due process grounds since the ministerial role of the office of the federal grand jury foreman is not such a vital one that discrimination in the

appointment of an individual to that post significantly invades the distinctive interests of the defendant protected by the Due Process Clause.⁷

In the absence of actual bias or prejudice, mere judicial participation in the selection of a grand jury does not deny due process.⁸ Furthermore, due process is not denied by disqualifying from service on a grand jury persons whose senses of hearing or sight are substantially impaired.⁹ It is not a denial of due process to exclude resident aliens from grand jury service,¹⁰ or to require that a grand jury be drawn solely and exclusively from lists of duly registered voters, even though the result is a systematic exclusion of aliens from grand jury service.¹¹ The exercise of individual judgment in the selection of grand jurors, rather than through the process used for the selection of petit jurors, does not, standing alone, deny due process.¹²

As a matter of due process, a state may require the prompt assertion of the right to challenge discriminatory practices in the makeup of a grand jury,¹³ though the application of such rules to particular persons or in particular circumstances may constitute a denial of due process.¹⁴

Prima facie case.

In order to prevail on the grounds of a Fifth Amendment due process violation in the grand jury selection process, a claimant must establish a prima facie case consisting of the identification of a cognizable class, a significant under-representation of that class, and the susceptibility to abuse of the selection procedure.¹⁵ Once a prima facie case is established, it must be overcome by the introduction of evidence that the discrimination has been unintentional.¹⁶

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Footnotes

- 1 N.J.—*State v. Porro*, 152 N.J. Super. 259, 377 A.2d 950 (Law Div. 1977), judgment aff'd, 158 N.J. Super. 269, 385 A.2d 1258 (App. Div. 1978).
Fairness of selection system
 In analyzing a due process challenge to a grand jury array, the supreme court's ultimate concern is to determine whether the selection system was unfair.
 Conn.—*State v. Castonguay*, 194 Conn. 416, 481 A.2d 56 (1984).
- 2 U.S.—*U.S. v. Scheufler*, 599 F.2d 893 (9th Cir. 1979).
 Conn.—*State v. Stepney*, 181 Conn. 268, 435 A.2d 701 (1980).
 Del.—*Laub v. State*, 366 A.2d 1183 (Del. 1976).
Grand jury must be unbiased
 Haw.—*State v. Griffin*, 126 Haw. 40, 266 P.3d 448 (Ct. App. 2011).
- 3 Ill.—*People v. Hollins*, 366 Ill. App. 3d 533, 304 Ill. Dec. 164, 852 N.E.2d 414 (3d Dist. 2006).
 Tenn.—*Holiday v. State*, 512 S.W.2d 953 (Tenn. Crim. App. 1972).
Conclusory allegations insufficient
 A defendant's conclusory allegations that a grand jury was improperly constituted in a robbery prosecution were insufficient to raise a due process claim, absent evidence that the county court systematically engaged in discriminatory practices during the selection of grand juries.
 N.Y.—*People v. Watkins*, 77 A.D.3d 1403, 909 N.Y.S.2d 233 (4th Dep't 2010).
Exclusion of teachers and students
 There was no rational basis for the total and arbitrary exclusion from grand jury service of the presidents, professors, tutors, and students of recognized colleges and universities; their exclusion was an impermissible violation of the due process rights of the criminal defendant to be indicted by an impartial grand jury drawn from a fair cross-section of the community.
 R.I.—*State v. Jenison*, 122 R.I. 142, 405 A.2d 3 (1979).

- 4 Cal.—*People v. Fujita*, 43 Cal. App. 3d 454, 117 Cal. Rptr. 757 (4th Dist. 1974).
- 5 Fla.—*State v. Lewis*, 152 Fla. 178, 11 So. 2d 337 (1943).
N.C.—*State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967).
- 6 Cal.—*People v. Fujita*, 43 Cal. App. 3d 454, 117 Cal. Rptr. 757 (4th Dist. 1974).
Jurors unable to read and write
La.—*State v. Woodfork*, 255 La. 611, 232 So. 2d 290 (1970).
Physicians and lawyers
Fla.—*Williams v. State*, 285 So. 2d 13 (Fla. 1973).
- 7 U.S.—*Hobby v. U.S.*, 468 U.S. 339, 104 S. Ct. 3093, 82 L. Ed. 2d 260 (1984).
New indictment and trial required
A new indictment and trial were required to remedy discrimination during the process for selecting grand jury foremen in a parish, with a 20% black population and employing an entirely subjective appointment procedure, that had appointed zero black foremen during 24-year-period preceding a habeas petitioner's murder indictment.
U.S.—*Crandell v. Cain*, 421 F. Supp. 2d 928 (W.D. La. 2004).
- 8 Mich.—*People v. Edmond*, 86 Mich. App. 374, 273 N.W.2d 85 (1978).
- 9 U.S.—*Eckstein v. Kirby*, 452 F. Supp. 1235 (E.D. Ark. 1978).
- 10 U.S.—*U.S. v. Avalos*, 541 F.2d 1100 (5th Cir. 1976).
- 11 Conn.—*State v. Thigpen*, 35 Conn. Supp. 98, 397 A.2d 912 (Super. Ct. 1978).
- 12 Mich.—*People v. Edmond*, 86 Mich. App. 374, 273 N.W.2d 85 (1978).
- 13 U.S.—*Michel v. State of La.*, 350 U.S. 91, 76 S. Ct. 158, 100 L. Ed. 83 (1955).
- 14 U.S.—*Reece v. State of Ga.*, 350 U.S. 85, 76 S. Ct. 167, 100 L. Ed. 77 (1955).
Pa.—*Com. v. Wasserman*, 466 Pa. 430, 353 A.2d 430 (1976).
- 15 U.S.—*U.S. v. Holman*, 680 F.2d 1340, 11 Fed. R. Evid. Serv. 209 (11th Cir. 1982).
Lower voting by Hispanics
The fact that Hispanics voted in a proportion lower than the rest of the population and were therefore underrepresented on jury panels presented no violation of due process.
U.S.—*U.S. v. Brummitt*, 665 F.2d 521 (5th Cir. 1981).
- 16 U.S.—*U.S. v. Holman*, 680 F.2d 1340, 11 Fed. R. Evid. Serv. 209 (11th Cir. 1982).

16C C.J.S. Constitutional Law § 1641

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XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

D. Indictment or Information; Arraignment and Plea

1. Indictment or Information

§ 1641. Constitutional rights with respect to the form and contents of indictments or informations

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

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To afford due process of law, an indictment or information must fairly inform the accused of the specific charge against him or her.

An intelligent and full understanding by the accused of the charge against him or her is a first requirement of due process.¹ Thus, an indictment or information, to afford due process of law, must fairly inform the accused of the specific charge against him or her,² and contain a statement of the acts which constitute the offense with reasonable certainty, so as to advise the accused what he or she has to meet and give him or her a fair and reasonable opportunity to prepare his or her defense,³ and to plead judgment of acquittal or conviction as a plea to a subsequent prosecution for the same offense,⁴ though beyond this, a statement of the facts as to matters of detail is not essential.⁵

To meet the test of due process, an indictment or information must contain all the essential elements of the offense charged.⁶ The omission of an essential element of the crime charged is a defect of substance rather than of form,⁷ however, the omission of an

element of a crime that is not material does not deny due process.⁸ While according to some authority a defendant is deemed to know, for due process notice purposes, that he or she may be convicted of the greater crime with which he or she is charged and any lesser-included offense, whether the lesser-included offense is pleaded in the information or not,⁹ other authority provides that due process operates to bar a conviction of a lesser offense unless the charging instrument alleges the commission of all the essential elements of the lesser offense as part of the crime charged.¹⁰

While an indictment or information framed in the language of the statute under which the accused is charged may be sufficient under the Due Process Clause,¹¹ it is not always sufficient to give notice to the accused of the nature of the crime even when it consists only of the general crime of being an accessory to a crime.¹² Such an indictment or information will withstand a due process attack only if the language of the statute sets forth fully, directly, and expressly all the essential elements of the crime.¹³

In connection with reliance upon either a firearm or deadly weapons statute or both, due process requires that the information contain specific allegations to that effect, thus putting the accused upon notice that enhanced consequences will flow from a conviction.¹⁴ The practice of allowing the State to proceed on alternative theories of premeditated murder and felony-murder without specifying which theory it will proceed on is not violative of due process,¹⁵ though because of the different forms or varieties of murder, an information charging murder without elaboration may not always provide notice sufficient to afford the due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution.¹⁶ Due process is not denied by charging the accused in an indictment containing several counts, each count alleging a different offense.¹⁷ An information which charges a criminal defendant with multiple counts of the same offense does not violate due process so long as the information informs defendant of the nature of the conduct with which he or she is accused, and the evidence presented at the preliminary hearing informs him or her of the particulars of the offenses which the prosecution may prove at trial.¹⁸ However, a failure to differentiate between multiple counts may violate a defendant's due process rights to notice.¹⁹ An allegation of a prior conviction is not a deprivation of due process,²⁰ and where an information charges an accused with prior offenses, the failure to charge him or her with being an habitual criminal does not constitute a denial of due process.²¹ In addition, the failure to charge in an indictment against an alleged habitual criminal that the several prior crimes have been committed in sequence is an irregularity in procedural law and not a denial of due process.²² Due process requires that any fact, other than prior convictions, that increases the maximum penalty for a crime must be charged in the indictment.²³ Under the Due Process Clause, at least one statutory aggravating factor, which is necessary to elevate a maximum sentence from life imprisonment to death, must be included in an indictment charging a death-eligible crime.²⁴ However, "non-statutory" aggravating factors need not be included in an indictment charging a death-eligible crime in order for the indictment to comport with due process since such factors, although relevant to determining whether a jury decides to impose the death penalty, do not make a defendant statutorily eligible for any sentence that could not be otherwise imposed in their absence.²⁵

Statutory provisions.

Although the legislature cannot by statute authorize a form of charge so inadequate that an accused is unable to answer it,²⁶ various statutory provisions have been considered not to be violative of due process, such as a statute prescribing the forms of indictments and informations,²⁷ providing for prosecution either by indictment or information,²⁸ and authorizing the charging of two or more different offenses of the same class of crimes in one indictment or information.²⁹

CUMULATIVE SUPPLEMENT

Cases:

Failure to allege mens rea or facts from which defendant's intent could be inferred, with regard to threatening nature of e-mail she allegedly sent, in indictment charging defendant with knowingly transmitting a threatening communication, rendered indictment fatally deficient in violation of Fifth Amendment; absent such allegation, indictment did not require grand jury find probable cause for each of the elements of the offense, overruling *United States v. Alaboud*, 347 F.3d 1293, and *United States v. Martinez*, 736 F.3d 981. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 875(c). U.S. v. Martinez, 800 F.3d 1293 (11th Cir. 2015).

A charging instrument that fails to allege a culpable state of mind or an element of an offense may result in a significant violation of due process, but the flawed instrument does not abrogate the jurisdiction of the court, which is established by statute and invoked by a charge of a cognizable offense prescribed by law; overruling *State v. Walker*, 126 Hawai'i 475, 273 P.3d 1161; *State v. Cummings*, 101 Hawai'i 139, 63 P.3d 1109. U.S.C.A. Const.Amend. 14; HRS § 604–1 et seq. *Schwartz v. State*, 136 Haw. 258, 361 P.3d 1161 (2015).

Indictment for six counts for first-degree child rape and six counts of sexual contact with a minor provided fair notice required by due process by reciting the language of the applicable criminal statutes and providing the county of the offenses, the initials of the victims, and the period in which the alleged offenses occurred. U.S.C.A. Const.Amend. 14; SDCL §§ 22–22–1, 22–22–7. *State v. Hernandez*, 2016 SD 5, 874 N.W.2d 493 (S.D. 2016).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Bergen v. U. S.*, 145 F.2d 181 (C.C.A. 8th Cir. 1944).
- 2 U.S.—*Cole v. State of Ark.*, 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644 (1948).
Ill.—*People v. Ligon*, 365 Ill. App. 3d 109, 301 Ill. Dec. 753, 847 N.E.2d 763 (1st Dist. 2006).
Ohio—*State v. Noling*, 98 Ohio St. 3d 44, 2002-Ohio-7044, 781 N.E.2d 88 (2002).
Okla.—*Selsor v. State*, 2000 OK CR 9, 2 P.3d 344 (Okla. Crim. App. 2000).
Notice of charges must set forth alleged misconduct with particularity
U.S.—*U.S. v. Tucker*, 703 F.3d 205 (3d Cir. 2012).
Specific method of offense charged
Where an indictment charges a defendant with committing an offense by one specific method, the defendant cannot be convicted of that offense based on a totally different, unspecified method, because to do so violates a defendant's rights under the Due Process Clause.
Ga.—*Petty v. Smith*, 279 Ga. 273, 612 S.E.2d 276 (2005).
Actual notice satisfies due process
Due process requirements are satisfied if a defendant receives actual notice of the charges against him or her even if the indictment or information is deficient.
U.S.—*Cole v. Roper*, 579 F. Supp. 2d 1246 (E.D. Mo. 2008), aff'd, 623 F.3d 1183 (8th Cir. 2010).
Cal.—*Byrd v. Municipal Court*, 125 Cal. App. 3d 1054, 178 Cal. Rptr. 480 (1st Dist. 1981).
Iowa—*State v. Marti*, 290 N.W.2d 570 (Iowa 1980).
Pa.—*Com., Dept. of Transp. Bureau of Traffic Safety v. Snyder*, 37 Pa. Commw. 359, 391 A.2d 3 (1978).
Language defendant can understand
It is fundamental that a defendant must be told what he or she has been accused of in language he or she can understand.
U.S.—*U.S. v. Mosquera*, 816 F. Supp. 168 (E.D. N.Y. 1993).
Indictment must provide notice
Due process of law requires that an indictment put the defendant on notice of the crimes with which he or she is charged and against which he or she must defend.
Ga.—*Stinson v. State*, 279 Ga. 177, 611 S.E.2d 52 (2005).
- 3

- 4 U.S.—*U.S. v. Huping Zhou*, 678 F.3d 1110 (9th Cir. 2012); *U.S. v. De Castro-Font*, 587 F. Supp. 2d 372 (D.P.R. 2008).
Ga.—*State v. Grube*, 293 Ga. 257, 744 S.E.2d 1 (2013).
Ky.—*Alford v. Com.*, 338 S.W.3d 240 (Ky. 2011).
Va.—*Farhoumand v. Com.*, 764 S.E.2d 95 (Va. 2014).
Wis.—*State v. Kempainen*, 2014 WI App 53, 354 Wis. 2d 177, 848 N.W.2d 320 (Ct. App. 2014).
- 5 U.S.—*Mabra v. Gray*, 518 F.2d 512 (7th Cir. 1975).
Fla.—*Murphy v. State*, 407 So. 2d 296 (Fla. 1st DCA 1981).
Ind.—*Elvers v. State*, 22 N.E.3d 824 (Ind. Ct. App. 2014).
N.C.—*State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981).
Failure to specify drug
In a prosecution for operating a motor vehicle while under the influence of a drug, the defendant was not deprived of due process rights by the failure of the complaint to specify the drug or family of drugs relied upon as a basis for the charge.
Cal.—*Ulloa v. Municipal Court*, 126 Cal. App. 3d 1073, 179 Cal. Rptr. 332 (2d Dist. 1981).
Time or place of crime
(1) A code form indictment of a defendant charged with robbery was sufficiently certain and definite so as not to deny him or her due process guarantees, even though it was silent as to the time and place of the alleged crime, since neither time nor place is material element of robbery.
Ala.—*O'Such v. State*, 351 So. 2d 676 (Ala. Crim. App. 1977).
(2) An indictment is not invalid if it omits or misstates the time at which an offense occurs when time is not an element of the offense.
Va.—*Farhoumand v. Com.*, 764 S.E.2d 95 (Va. 2014).
- 6 U.S.—*U.S. v. Mann*, 701 F.3d 274, 90 Fed. R. Evid. Serv. 18 (8th Cir. 2012), cert. denied, 134 S. Ct. 470, 187 L. Ed. 2d 316 (2013); *U.S. v. Huping Zhou*, 678 F.3d 1110 (9th Cir. 2012).
Fla.—*Lawshea v. State*, 99 So. 3d 603 (Fla. 2d DCA 2012).
Va.—*Farhoumand v. Com.*, 764 S.E.2d 95 (Va. 2014).
Identification of victim by use of alias
For the purposes of due process analysis, identification of a victim by use of an alias or other name by which the victim is generally known sufficiently informs a defendant of the victim's identity and apprises the defendant of the nature of evidence he or she must be prepared to meet.
Ga.—*State v. Grube*, 293 Ga. 257, 744 S.E.2d 1 (2013).
Requisite state of mind
A charge that fails to charge a requisite state of mind cannot be construed reasonably to state an offense, and thus, the charge is dismissed without prejudice because it violates due process.
Haw.—*State v. Armitage*, 132 Haw. 36, 319 P.3d 1044 (2014).
Combined charge
Through a combined charge of armed robbery and attempted second-degree murder in a bill of information, the defendant was fully notified of every element of the crime of second-degree murder; thus, his due process right to be informed of the charges against him was not violated.
La.—*State v. Stewart*, 400 So. 2d 633 (La. 1981).
Ordinary language sufficient
Where an information alleges an offense and pleads the particular facts constituting the offense in ordinary language, such that a person of common understanding can know what is intended and prepare a defense to the charge, no due process violation occurs, despite the failure to allege each element of the offense.
Okla.—*Parker v. State*, 1996 OK CR 19, 917 P.2d 980 (Okla. Crim. App. 1996).
Haw.—*State v. Apao*, 59 Haw. 625, 586 P.2d 250 (1978).
Or.—*State v. Templeton*, 23 Or. App. 39, 541 P.2d 163 (1975).
Mo.—*State v. Miller*, 372 S.W.3d 455 (Mo. 2012).
Okla.—*Shrum v. State*, 1999 OK CR 41, 991 P.2d 1032 (Okla. Crim. App. 1999).
All degrees and theories of murder
An information charging defendant with "MURDER, in violation of PENAL CODE SECTION 187(a)" and alleging he acted "willfully, unlawfully, and with malice aforethought" places the defense on notice of, and

allows trial and conviction on, all degrees and theories of murder, including first-degree felony murder, such that lack of specificity does not violate a defendant's due process and jury trial guarantees.

Cal.—*People v. Contreras*, 58 Cal. 4th 123, 165 Cal. Rptr. 3d 204, 314 P.3d 450 (2013).

Ind.—*Roddy v. State*, 182 Ind. App. 156, 394 N.E.2d 1098 (1979).

Conviction of theft offense

Where the language of an indictment for burglary did not include all the elements of a theft offense, a conviction for theft without notice of such a charge would violate due process.

Ohio—*State v. Harris*, 65 Ohio App. 2d 182, 19 Ohio Op. 3d 133, 417 N.E.2d 573 (2d Dist. Greene County 1979).

Ga.—*Stewart v. State*, 246 Ga. 70, 268 S.E.2d 906 (1980).

Minn.—*State v. Dunson*, 770 N.W.2d 546 (Minn. Ct. App. 2009).

Mont.—*State v. Boone*, 178 Mont. 225, 583 P.2d 405 (1978).

Statute must sufficiently describe the crime

In general, where the statute sets forth with reasonable clarity all essential elements of the crime intended to be punished, and fully defines the offense in unmistakable terms readily comprehensible to persons of common understanding, a charge drawn in the language of the statute is sufficient; in some cases, however, a charge tracking the language of the statute defining the offense nevertheless violates an accused's due process rights because some statutes fail to sufficiently describe the crime.

Haw.—*State v. Nesmith*, 127 Haw. 48, 276 P.3d 617 (2012).

Ariz.—*State v. Dailey*, 122 Ariz. 578, 596 P.2d 716 (Ct. App. Div. 1 1979).

U.S.—*Choung v. People of State of Cal.*, 320 F. Supp. 625 (E.D. Cal. 1970).

Wash.—*State v. Theroff*, 95 Wash. 2d 385, 622 P.2d 1240 (1980).

Fla.—*Griffin v. State*, 414 So. 2d 1025 (Fla. 1982).

Cal.—*People v. Kipp*, 26 Cal. 4th 1100, 113 Cal. Rptr. 2d 27, 33 P.3d 450 (2001).

U.S.—*U.S. v. Davis*, 564 F.2d 840, 2 Fed. R. Evid. Serv. 746 (9th Cir. 1977).

Mo.—*State v. Shive*, 621 S.W.2d 715 (Mo. Ct. App. S.D. 1981).

Mont.—*State v. Johnson*, 149 Mont. 173, 424 P.2d 728 (1967).

Cal.—*People v. Peyton*, 176 Cal. App. 4th 642, 98 Cal. Rptr. 3d 243 (4th Dist. 2009).

U.S.—*Valentine v. Konteh*, 395 F.3d 626, 2005 FED App. 0035P (6th Cir. 2005).

Iowa—*State v. See*, 805 N.W.2d 605 (Iowa Ct. App. 2011).

Duplicious count

Ky.—*Johnson v. Com.*, 405 S.W.3d 439 (Ky. 2013).

Cal.—*People v. Hesbon*, 264 Cal. App. 2d 846, 70 Cal. Rptr. 885 (5th Dist. 1968).

Ga.—*Landers v. Smith*, 226 Ga. 274, 174 S.E.2d 427 (1970).

N.C.—*State v. Jackson*, 280 N.C. 563, 187 S.E.2d 27 (1972).

Alleging prior conviction

Alleging a prior conviction in a complaint or information where the State seeks to enhance the conviction from a misdemeanor to a felony or increase the misdemeanor penalty comports with the procedural due process consideration of notice.

Nev.—*English v. State*, 116 Nev. 828, 9 P.3d 60 (2000).

Cal.—*Ex parte Mead*, 92 Cal. App. 2d 536, 206 P.2d 1091 (3d Dist. 1949).

Ky.—*Harrod v. Whaley*, 242 S.W.2d 750 (Ky. 1951).

U.S.—*U.S. v. Hager*, 721 F.3d 167 (4th Cir. 2013), petition for certiorari filed, 134 S. Ct. 1936, 188 L. Ed. 2d 964 (2014); *U.S. v. Okai*, 454 F.3d 848 (8th Cir. 2006).

Ill.—*People v. Starnes*, 374 Ill. App. 3d 132, 311 Ill. Dec. 821, 869 N.E.2d 834 (1st Dist. 2007).

Miss.—*Batiste v. State*, 121 So. 3d 808 (Miss. 2013), cert. denied, 134 S. Ct. 2287, 189 L. Ed. 2d 178 (2014).

Sentencing enhancements

As a matter of due process, the accused must be given notice in the charging document of any fact on which a sentencing enhancement will be based.

Cal.—*People v. Arias*, 182 Cal. App. 4th 1009, 105 Cal. Rptr. 3d 887 (2d Dist. 2010).

Fla.—*B.O. v. State*, 25 So. 3d 586 (Fla. 4th DCA 2009).

U.S.—*U.S. v. Brown*, 441 F.3d 1330, 69 Fed. R. Evid. Serv. 738 (11th Cir. 2006).

- 25 U.S.—U.S. v. Brown, 441 F.3d 1330, 69 Fed. R. Evid. Serv. 738 (11th Cir. 2006); Moeller v. Weber, 635 F. Supp. 2d 1036 (D.S.D. 2009), order amended on denial of reconsideration, 2010 WL 9519011 (D.S.D. 2010) and judgment aff'd, 649 F.3d 839, 103 A.L.R.6th 721 (8th Cir. 2011).
- 26 Cal.—People v. Saffell, 74 Cal. App. 2d Supp. 967, 168 P.2d 497 (App. Dep't Super. Ct. 1946).
- 27 N.C.—State v. May, 354 N.C. 172, 552 S.E.2d 151 (2001).
- Short-form indictment**
- A short-form indictment alleging the elements of common law murder is sufficient to inform the defendant of the charge against him or her and thus satisfies the requirements of the Sixth Amendment and the Due Process Clause.
- U.S.—Allen v. Lee, 366 F.3d 319 (4th Cir. 2004).
- 28 Cal.—People v. McGrath, 62 Cal. App. 3d 82, 133 Cal. Rptr. 27 (3d Dist. 1976).
- 29 U.S.—U.S. v. Phillips, 522 F.2d 388 (8th Cir. 1975).
- D.C.—U.S. v. Bradford, 344 A.2d 208 (D.C. 1975).

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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

D. Indictment or Information; Arraignment and Plea

1. Indictment or Information

§ 1642. Constitutional rights with respect to amended and supplemental charge

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4528, 4573 to 4583, 4595

In the absence of any prejudice to the accused's rights, due process of law is not denied by the allowance of amendments to an indictment or information.

Absent prejudice to the accused's rights or a change in the nature of the offense charged, due process of law is not denied by the allowance of amendments to an indictment or information.¹ However, any material change invalidates an indictment and deprives the court of the power to try an accused on it,² even if the accused agrees that the facts stipulated should have the same effect as though set forth in the indictment.³ Due process is satisfied if an amendment of an indictment identifies the charge with sufficient clarity to allow the accused to prepare his or her defense.⁴

Where no good reason exists for delay in filing a supplemental information, and where the delay substantially prejudices the defendant's rights, the filing of the supplemental information constitutes a denial of due process.⁵

The use of superseding indictments does not violate due process,⁶ and the fact that no evidence is presented at a superseding indictment proceeding in addition to that presented in the original indictment proceeding does not result in a denial of due process.⁷ However, proof of vindictiveness in obtaining a superseding indictment would establish a due process violation.⁸ A defendant's due process rights are implicated when the information is amended on remand following a successful appeal.⁹ Likewise, reindictment violates due process whenever a prosecutor adds new charges merely to retaliate against the defendant for exercising statutory or constitutional rights.¹⁰

Habitual criminal charge.

The bringing of a habitual criminal charge by supplemental information does not violate the Due Process Clause of the Fourteenth Amendment.¹¹ However, due process requires that a supplemental information contain the dates of the convictions and the precise charges in order that the accused might be properly apprised of the charge he or she is facing as an habitual offender.¹²

CUMULATIVE SUPPLEMENT

Cases:

Government's addition of forfeiture notice in second superseding indictment charging defendant with conspiracy to commit bank fraud, arising from scheme in which defendant and bank official deposited checks in defendant's account knowing deposited checks would not clear, was act of prosecutorial vindictiveness that violated defendant's right to due process; only after district court issued show cause order requesting that government's counsel file pleading addressing why sanctions should not be imposed for prosecutor's failure to disclose government witness's plea agreement supplement in defendant's first trial did the government file superseding indictment that included forfeiture count, and although forfeiture count was added by prosecution team that was not involved in original prosecution and appeal, new prosecution team was made up of attorneys who simply worked in different division of same office. *U.S.C.A. Const.Amend. 5. U.S. v. Dvorin*, 817 F.3d 438, 99 Fed. R. Evid. Serv. 1358 (5th Cir. 2016).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Byrd v. Israel*, 513 F. Supp. 1077 (E.D. Wis. 1981).
Ark.—*Manning v. State*, 318 Ark. 1, 883 S.W.2d 455 (1994).
Kan.—*State v. Nunn*, 244 Kan. 207, 768 P.2d 268 (1989).
Specific showing of prejudice required to establish denial of due process
Conn.—*State v. Caracoglia*, 134 Conn. App. 175, 38 A.3d 226 (2012).
No material change to work of grand jury permitted
Mass.—*Com. v. Roby*, 462 Mass. 398, 969 N.E.2d 142 (2012).
Amendment merely alleging additional means by which crime committed
An amendment to an indictment that merely alleges additional means by which the defendant may have committed crime is permissible under due process so long as it does not prejudice the defendant.
Idaho—*State v. Severson*, 147 Idaho 694, 215 P.3d 414 (2009).
Leave of court

Requiring leave of court before the prosecution may amend an information following a defendant's plea has long been an important safeguard for the rights of the accused; the discretion afforded trial courts to refuse such amendment ensures the due process rights of criminal defendants are adequately protected.

Cal.—*People v. Leonard*, 228 Cal. App. 4th 465, 175 Cal. Rptr. 3d 300 (4th Dist. 2014).

U.S.—*Heald v. U.S.*, 177 F.2d 781 (10th Cir. 1949).

Ohio—*State v. Davis*, 60 Ohio App. 2d 355, 14 Ohio Op. 3d 315, 397 N.E.2d 1215 (5th Dist. Morgan County 1978).

Constructive amendments

Constructive amendments of an indictment, which occur when the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify the essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment, are per se violations of due process.

U.S.—*U.S. v. Ford*, 435 F.3d 204, 69 Fed. R. Evid. Serv. 307 (2d Cir. 2006).

Fla.—*Spagnolo v. State*, 116 So. 3d 599 (Fla. 5th DCA 2013), review denied, 137 So. 3d 1022 (Fla. 2014).

U.S.—*U.S. v. Fawcett*, 115 F.2d 764, 132 A.L.R. 404 (C.C.A. 3d Cir. 1940).

U.S.—*U. S. ex rel. Good v. Rundle*, 271 F. Supp. 948 (E.D. Pa. 1967).

Mich.—*People v. Marshall*, 41 Mich. App. 66, 199 N.W.2d 521 (1972).

U.S.—*U.S. v. Drebin*, 557 F.2d 1316 (9th Cir. 1977).

U.S.—*U.S. v. Cooper*, 464 F.2d 648 (10th Cir. 1972).

U.S.—*U.S. v. Begay*, 602 F.3d 1150 (10th Cir. 2010).

No vindictiveness shown

U.S.—*U.S. v. Stenger*, 605 F.3d 492 (8th Cir. 2010).

Presumption of prosecutorial vindictiveness rebutted

U.S.—*U.S. v. Aviles-Sierra*, 576 F. Supp. 2d 235 (D.P.R. 2008).

Colo.—*People v. Cook*, 2014 COA 33, 342 P.3d 539 (Colo. App. 2014), cert. denied, 2015 WL 339028 (Colo. 2015).

U.S.—*U.S. v. Kendrick*, 682 F.3d 974, 88 Fed. R. Evid. Serv. 790 (11th Cir. 2012).

Ark.—*Manning v. State*, 318 Ark. 1, 883 S.W.2d 455 (1994).

N.M.—*State v. Mayberry*, 97 N.M. 760, 1982-NMCA-061, 643 P.2d 629 (Ct. App. 1982).

Failure to give timely notice

The defendant was not denied due process by the State's failure to give him and his counsel timely and sufficient notice of habitual criminal act charges filed by an amended information where the defendant voluntarily testified and admitted the prior convictions in his testimony.

Mo.—*State v. Morton*, 426 S.W.2d 19 (Mo. 1968).

Mich.—*People v. King*, 104 Mich. App. 459, 304 N.W.2d 605 (1981).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

D. Indictment or Information; Arraignment and Plea

1. Indictment or Information

§ 1643. Constitutional rights with respect to variances between indictments and proof or verdicts

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4528, 4573 to 4583, 4595

It is a denial of due process to convict an accused of a charge which is not made, tried, or necessarily included in the charged offenses.

It is a denial of due process of law to convict an accused of a charge which is not made, tried, or necessarily included in the charged offenses.¹ Accordingly, a variance between the indictment and the evidence at trial may be fatal to a conviction because due process guarantees the defendant notice of the charges against him or her.² However, an accused is not deprived of his or her liberty without due process of law by a verdict convicting him or her of a lesser offense than that charged in the indictment or information, but of the same generic class,³ or by a statute permitting the accused to be charged as a principal and convicted as an accessory.⁴

A fatal variance between the complainant's name in the indictment and the name proved by the evidence violates the concepts of adequate notice grounded in the Due Process Clause.⁵ Furthermore, it is a violation of due process to convict, of a summary offense, a person who is not named as a party to the action concerned.⁶

CUMULATIVE SUPPLEMENT

Cases:

Defendant's conviction of robbery, a crime for which he neither had been indicted nor had he waived indictment, was a plain, clear, and obvious error that violated his fundamental rights under the United States Constitution and the Mississippi Constitution and constituted a manifest miscarriage of justice; defendant had been indicted for burglary, not the entirely distinct crime of robbery, and because robbery was not a lesser-included offense of burglary, defendant could not be convicted of robbery. [U.S. Const. Amend. 5](#); [Miss. Const. art. 3, § 27](#); [Miss. Code. Ann. §§ 97-3-73, 97-17-23, 99-19-5](#). [Pace v. State, 242 So. 3d 107 \(Miss. 2018\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S.—*Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 \(1979\)](#).
[Idaho—*Carr v. Pridgen*, 157 Idaho 238, 335 P.3d 578 \(2014\)](#).
[Ill.—*People v. Kennebrew*, 2013 IL 113998, 371 Ill. Dec. 297, 990 N.E.2d 197 \(Ill. 2013\)](#).
[Kan.—*State v. Ramirez*, 299 Kan. 224, 328 P.3d 1075 \(2014\)](#).
Fundamental error
[Fla.—*Reddick v. State*, 56 So. 3d 132 \(Fla. 5th DCA 2011\)](#).
Specific offenses charged
Procedural due process requires that a person be tried and convicted only for the specific offenses with which he or she is charged.
[U.S.—*U.S. v. Maselli*, 534 F.2d 1197 \(6th Cir. 1976\)](#).
Lesser included offense
(1) As a matter of law, a defendant has adequate notice of an uncharged offense that meets the definition of a lesser included offense, so as to satisfy principles of due process.
[Colo.—*People v. Duran*, 272 P.3d 1084 \(Colo. App. 2011\)](#).
(2) Defendant's due process notice rights were not violated by a conviction of third-degree home invasion as a necessarily lesser-included offense of charged first-degree home invasion; because all the elements of third-degree home invasion were subsumed within the elements required for first-degree home invasion in defendant's case, defendant was on notice of all the elements of the crime he was required to defend against.
[Mich.—*People v. Wilder*, 485 Mich. 35, 780 N.W.2d 265 \(2010\)](#).
Lesser nonincluded offense
(1) For purposes of due process analysis, a defendant is not placed on notice by his or her indictment that he or she may be criminally liable for a lesser-non-included crime, because the lesser offense is not necessarily included in the charged offense.
[Miss.—*Edwards v. State*, 124 So. 3d 105 \(Miss. Ct. App. 2013\)](#).
(2) Allowing a jury to find a defendant guilty of an unindicted offense that was not a lesser-included offense of the charged offense runs afoul of due process requirements.
[Tex.—*Beasley v. State*, 426 S.W.3d 140 \(Tex. App. Houston 1st Dist. 2012\)](#).
[Ga.—*New v. State*, 327 Ga. App. 87, 755 S.E.2d 568 \(2014\)](#).
[Tex.—*Kelley v. State*, 429 S.W.3d 865 \(Tex. App. Houston 14th Dist. 2014\)](#), petition for discretionary review refused, (Sept. 24, 2014).
- 2

Prejudice required for due process violation

U.S.—[Davis v. Poole](#), 767 F. Supp. 2d 409 (W.D. N.Y. 2011).

Variance must be material

In order to be fatal under the Due Process Clause, a variance between the charging instrument and the proof at trial must be material and of such character that it misleads the accused in making his or her defense or exposes him or her to double jeopardy.

Ill.—[People v. Roe](#), 388 Ill. Dec. 812, 25 N.E.3d 95 (App. Ct. 5th Dist. 2015).

Essential difference required

A "variance" that raises due process concerns is an essential difference between the charging instrument and the proof presented at trial.

Ind.—[Tipton v. State](#), 981 N.E.2d 103 (Ind. Ct. App. 2012), transfer denied, 984 N.E.2d 221 (Ind. 2013).

Ind.—[Beck v. State](#), 169 Ind. App. 364, 348 N.E.2d 409 (1976).

Kan.—[State v. Green](#), 222 Kan. 729, 567 P.2d 893 (1977).

Charge of rape; conviction of forcible sexual abuse

U.S.—[Mildwoff v. Cunningham](#), 432 F. Supp. 814 (S.D. N.Y. 1977).

Charge of manslaughter; conviction of negligent homicide

Colo.—[People v. Palumbo](#), 192 Colo. 7, 555 P.2d 521 (1976).

Charge of murder in the first degree; conviction of murder in the second degree

U.S.—[Vasquez v. Vaughn](#), 454 F. Supp. 194 (D. Del. 1978).

Colo.—[Mulligan v. People](#), 68 Colo. 17, 189 P. 5 (1919).

Tex.—[Boyette v. State](#), 632 S.W.2d 915 (Tex. App. Houston 14th Dist. 1982), petition for discretionary review refused.

Pa.—[Com. ex rel. City of Allentown v. Howells](#), 66 Pa. Commw. 647, 445 A.2d 875 (1982).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

D. Indictment or Information; Arraignment and Plea

2. Arraignment and Plea

§ 1644. Constitutional rights with respect to arraignments and pleas, in general

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4584 to 4590

Proceeding to trial without a plea is not necessarily a denial of due process, and an accused may waive his or her rights by failure to object at the proper time; further, mere failure to comply with precise ceremonial or verbal formality does not constitute a denial of due process.

Proceeding to trial without a plea is not a denial of due process;¹ in fact, an arraignment is not a procedure required under the Due Process Clause of the Fifth Amendment.² The lack of formal arraignment on a second information on a new trial does not constitute want of due process if the accused is deprived of no substantial right, and the course of the trial is not changed to his or her disadvantage.³ A failure to arraign the accused on a particular offense does not violate due process where the State has adopted a procedure sufficient to meet due process, and an arraignment would have been required had only an information or indictment been filed.⁴

Due process of law does not require that any technical form of procedure be followed as regards arraignment, so long as the identity of the accused is definite, sufficient notice of the charges is given, and ample opportunity to plead is afforded.⁵ Furthermore, mere failure to comply with precise ceremonial or verbal formality with respect to arraignment and entry of a

plea is not a denial of due process for which a conviction must be set aside.⁶ A procedure whereby an arraigning officer rather than the arresting officer is permitted to present respondents at arraignment proceedings in non-traffic ordinance violation cases satisfies due process requirements.⁷

A mere delay in arraigning the accused does not constitute a denial of due process⁸ even though such delay is in violation of a statute or rule requiring that the accused be arraigned before the nearest magistrate without unnecessary delay.⁹ To show a deprivation of due process because of delay in arraignment, there must be a showing of prejudice to the effect that some essential element of a defense has been lost or minimized.¹⁰ In the absence of any justification by the State, a delay in arraignment which results in prejudice to the accused violates due process of law.¹¹

Waiver.

An accused may waive the right to an arraignment either expressly¹² or by the failure to enter objection at the proper time.¹³ Arraignment may be waived when the accused proceeds to trial and defends against the charge, without any violation of the Due Process Clause so long as the accused has sufficient notice of accusation and an adequate opportunity to defend himself or herself.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

County sheriff's policy of holding detainees on capias warrants without an arraignment or other court proceeding until the circuit court that issued the capias next convened violated procedural due process; policy denied criminal defendants their enumerated constitutional rights relating to criminal procedure by cutting them off from the judicial officers charged with implementing constitutional criminal procedure. [U.S. Const. Amend. 14](#). [Jauch v. Choctaw County](#), 874 F.3d 425 (5th Cir. 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 Cal.—[People v. Agnew](#), 110 Cal. App. 2d Supp. 837, 242 P.2d 410 (App. Dep't Super. Ct. 1952).
Noncompliance with statute
Noncompliance with an arraignment statute does not automatically result in a denial of due process.
Or.—[Barnes v. Cupp](#), 44 Or. App. 533, 606 P.2d 664 (1980).
- 2 Ohio—[State v. Phillips](#), 74 Ohio St. 3d 72, 1995-Ohio-171, 656 N.E.2d 643 (1995).
- 3 U.S.—[Garland v. State of Washington](#), 232 U.S. 642, 34 S. Ct. 456, 58 L. Ed. 772 (1914).
- 4 S.D.—[City of Rapid City v. Albertus](#), 310 N.W.2d 167 (S.D. 1981) (traffic offenses).
- 5 Pa.—[Com. v. Phelan](#), 427 Pa. 265, 234 A.2d 540 (1967) (overruled on other grounds by, [Com. v. Walzack](#), 468 Pa. 210, 360 A.2d 914 (1976)).
S.D.—[State v. Anderson](#), 2013 SD 36, 831 N.W.2d 54 (S.D. 2013).
Closed-circuit arraignment not violation of due process
Ohio—[State v. Phillips](#), 74 Ohio St. 3d 72, 1995-Ohio-171, 656 N.E.2d 643 (1995).
- 6 U.S.—[Mayes v. U.S.](#), 177 F.2d 505 (8th Cir. 1949).
Neb.—[State v. Jones](#), 218 Neb. 382, 355 N.W.2d 227 (1984).

- 7 Mich.—*City of Detroit v. Recorder's Court Judge, Traffic and Ordinance Division*, 85 Mich. App. 284, 271 N.W.2d 202 (1978).
- 8 U.S.—*Patzig v. O'Neil*, 577 F.2d 841 (3d Cir. 1978).
Minn.—*Simberg v. State*, 288 Minn. 175, 179 N.W.2d 141 (1970).
Okla.—*Logan v. State*, 1972 OK CR 38, 493 P.2d 842 (Okla. Crim. App. 1972).
Absent actual and substantial prejudice
Mich.—*People v. Woolfolk*, 304 Mich. App. 450, 848 N.W.2d 169 (2014).
Hospitalization of accused
Ill.—*People v. Thompson*, 91 Ill. App. 3d 1111, 47 Ill. Dec. 643, 415 N.E.2d 648 (1st Dist. 1980).
Illness of accused
Where the delay between arrest and arraignment is caused by the defendant's transfer from another state and by his own illness, the delay does not constitute a denial of due process.
U.S.—*U.S. v. Richerson*, 461 F.2d 935 (10th Cir. 1972).
- 9 N.J.—*State v. Schmieder*, 5 N.J. 40, 74 A.2d 290 (1950); *State v. Mulvaney*, 21 N.J. Super. 457, 91 A.2d 359 (App. Div. 1952).
Due process requires prompt arraignment
Mich.—*People v. Mallory*, 421 Mich. 229, 365 N.W.2d 673 (1984).
- 10 N.Y.—*People v. Jones*, 56 Misc. 2d 884, 290 N.Y.S.2d 771 (Sup 1968).
- 11 Wash.—*State v. Hodges*, 28 Wash. App. 902, 626 P.2d 1025 (Div. 2 1981).
- 12 Ala.—*Brinks v. State*, 44 Ala. App. 601, 217 So. 2d 813 (1968).
Waiver by public defender
A drug defendant failed to establish that he was harmed by his public defender's waiver of formal arraignment and entry of a plea of not guilty on his behalf and thus failed to establish a violation of his due process rights; defendant made no argument as to any other desired plea.
La.—*State v. Birgans*, 57 So. 3d 478 (La. Ct. App. 2d Cir. 2011), writ denied, 75 So. 3d 917 (La. 2011).
- 13 Ohio—*Ingham v. State*, 35 Ohio App. 311, 172 N.E. 401 (5th Dist. Coshocton County 1929).
- 14 Wash.—*State v. Anderson*, 12 Wash. App. 171, 528 P.2d 1003 (Div. 1 1974).
Mont.—*State v. DaSilva*, 2011 MT 183, 361 Mont. 288, 258 P.3d 419 (2011).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

D. Indictment or Information; Arraignment and Plea

2. Arraignment and Plea

§ 1645. Constitutional rights with respect to guilty pleas

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West's Key Number Digest

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Due process embraces a requirement that a guilty plea be made voluntarily and intelligently.

Generally, the procedure surrounding pleas of guilty in state courts must meet the standards of due process required by the Federal Constitution.¹ More specifically, due process requires that before a guilty plea is accepted, the court determine that the accused has a clear understanding of the charge, and is aware of the possible defenses to it and the circumstances in mitigation thereof, and that his or her admission of guilt is without reservation.² A conviction which is based upon an involuntary guilty plea is inconsistent with due process of law.³

Due process requires that the accused be advised of the charges against him or her before acceptance of a guilty plea.⁴ However, the State is not required to utilize all of the procedures required by a federal rule prescribing the procedure for the acceptance of pleas of guilty⁵ nor does due process require that a full admonishment be given by the trial court in order to insure that a guilty plea is voluntarily and intelligently entered in misdemeanor cases.⁶ A guilty plea satisfies due process if it reflects the considered choice of the accused, free of any factor or inducement which has unfairly influenced or overcome his or her

will.⁷ There is no due process requirement that an accused be afforded a formal recitation of the elements of the offense before accepting his or her guilty plea⁸ or that the accused be advised of the possibility of habitual criminal charges being filed.⁹ In any event, it is only when the accused has not been fully apprised of its consequences that his or her guilty plea can be challenged as being in violation of the due process guaranty.¹⁰

The requirements of due process are fulfilled if the accused is clearly informed of the offense charged and understandingly pleads guilty¹¹ even though he or she is not represented by counsel.¹² In order for a guilty plea to withstand an attack on due process grounds, there must be an affirmative showing that it has been given voluntarily and intelligently.¹³ In this regard, the record must show that the judge has canvassed the matter with the accused before accepting the guilty plea to determine whether the accused is freely and intelligently waiving his or her constitutional right relating to self-incrimination, confrontation, and jury trial, and whether the accused understands the nature and consequences of his or her plea.¹⁴

In other words, to meet the test of due process, a guilty plea must constitute an intentional relinquishment or abandonment of a known right or privilege,¹⁵ and such a relinquishment or abandonment is possible only after the accused has been advised of the right to trial by jury and confrontation of accusers and the privilege against self-incrimination.¹⁶ If the plea is not knowing and voluntary, it has been obtained in violation of due process.¹⁷ In this connection, a guilty plea is not voluntary unless the accused has received real notice of the true nature of the charge against him or her.¹⁸

While due process requires that a factual basis for a conviction appear from the waiver of rights which culminates in conviction by a guilty plea,¹⁹ an inquiry into the factual basis of a guilty plea is not necessary to assure due process.²⁰ Due process under the Federal Constitution does not require a state court to establish the factual basis for a guilty plea absent "special circumstances," which occur only when a defendant pleads guilty and simultaneously proclaims his or her innocence.²¹

The withholding of the privilege of withdrawing an involuntary guilty plea constitutes a denial of due process of law.²² However, an accused is not deprived of due process by the denial of permission to withdraw a voluntary guilty plea before or after sentence is imposed.²³ The failure to conduct an evidentiary hearing on an accused's motion to withdraw his or her guilty plea does not violate his or her constitutional right of due process.²⁴ A guilty plea at the preliminary examination should be treated in the same way as confessions.²⁵

Various other matters relating to a guilty plea by an accused which are not violative of due process include the failure to advise the accused of a mandatory parole term at the time he or she enters a guilty plea,²⁶ the failure to disclose other pending investigations to the accused,²⁷ and the acceptance of a guilty plea on the same day counsel is appointed for the accused.²⁸ In addition, it is not a violation of due process for the court to fail to follow the prosecutor's sentencing recommendation²⁹ or to fail to advise the accused of the consequences of his or her prior convictions.³⁰

Vacation of plea.

Due process requirements are satisfied by the placing of the burden upon the party seeking to vacate a plea agreement to establish both the breach and that the breach is sufficiently material to warrant releasing the party from its promises.³¹

Matters rendering plea invalid.

The acceptance of a guilty plea may constitute a denial of due process where such plea has been induced by coercion, deception, or promises,³² or where it has been made while under the influence of drugs;³³ or without the advice of counsel and without explanation to the accused of his or her right to have counsel.³⁴ Furthermore, the acceptance of a guilty plea may constitute a denial of due process where made without the advice of counsel by one who obviously cannot intelligently and understandingly plead or defend him- or herself without the assistance of counsel,³⁵ or under circumstances which renders its acceptance fundamentally unfair or shocking to a sense of justice.³⁶ Likewise, due process requires that a criminal defendant be mentally competent in order to be permitted to plead guilty³⁷ so that a conviction on a guilty plea is violative of due process when the accused is afflicted with such mental incompetence that he or she is incapable of a rational as well as a factual understanding of the nature of the offense.³⁸

Total ignorance of the outer limits of the penalty which the accused may suffer also renders a guilty plea invalid on due process grounds.³⁹ An allegation that a defendant's plea was based on grossly inaccurate advice about the actual time he or she would serve in prison gives rise to a colorable claim under the Due Process Clause.⁴⁰ A due process violation occurs when there is absolutely no mention to a defendant, before the defendant actually pleads guilty, that he or she must serve a mandatory supervised release term in addition to the agreed-upon sentence that he or she will receive in exchange for a plea of guilty.⁴¹ Likewise, to meet due process requirements, a defendant must be aware of the postrelease supervision component of his or her sentence in order to knowingly, voluntarily, and intelligently choose among alternative courses of action, vacatur of the guilty plea being required in the absence of such awareness.⁴² Deportation constitutes such a substantial and unique consequence of a plea that it must be mentioned by the trial court to a defendant as a matter of fundamental fairness to satisfy the defendant's right to due process.⁴³ Finally, if neither the defendant, nor his or her counsel, nor the trial court correctly understand the essential elements of the crime with which the defendant is charged, the defendant's guilty plea is invalid under the Due Process Clause.⁴⁴

CUMULATIVE SUPPLEMENT

Cases:

Plain error arising from magistrate judge's egregious failure, at plea colloquy, to comply with requirements for determining that defendant's guilty plea was knowing and voluntary, was sufficiently serious to impinge on the fairness, integrity, or public reputation of judicial proceedings, as required for reversal on plain error review, in prosecution for attempted illegal reentry; due process required that a guilty plea be knowing and voluntary. *U.S. Const. Amend. 5*; Immigration and Nationality Act § 276(a), 8 U.S.C.A. § 1326(a); Fed. R. Crim. P. 11(b)(2). *United States v. Fuentes-Galvez*, 969 F.3d 912 (9th Cir. 2020).

Admonitions regarding mandatory supervised release (MSR) to defendants under rule governing admonitions to a defendant during a plea hearing are not required to expressly link MSR during the pronouncement of the agreed-upon sentence to satisfy due process; overruling *People v. Burns*, 405 Ill.App.3d 40, 342 Ill.Dec. 915, 933 N.E.2d 1208; *People v. Daniels*, 388 Ill.App.3d 952, 328 Ill.Dec. 815, 905 N.E.2d 349; *People v. Company*, 376 Ill.App.3d 846, 315 Ill.Dec. 465, 876 N.E.2d 1055; *People v. Smith*, 386 Ill.App.3d 473, 325 Ill.Dec. 386, 898 N.E.2d 119. *U.S. Const. Amend. 14*; 730 Ill. Comp. Stat. Ann. 5/5-8-1(d)(1); Ill. Sup. Ct. R. 402(a)(2). *People v. Boykins*, 2017 IL 121365, 419 Ill. Dec. 385, 93 N.E.3d 504 (Ill. 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Harms v. Cline*, 27 F. Supp. 3d 1173 (D. Kan. 2014); U. S. ex rel. *Thurmond v. Mancusi*, 275 F. Supp. 508 (E.D. N.Y. 1967).
Conn.—*State v. Anonymous* (1974-1), 31 Conn. Supp. 501, 320 A.2d 327 (C.P. 1974).
- 2 U.S.—U. S. ex rel. *Elksnis v. Gilligan*, 256 F. Supp. 244 (S.D. N.Y. 1966).
- 3 Colo.—*Lacy v. People*, 775 P.2d 1 (Colo. 1989).
S.D.—*Goodroad v. Solem*, 406 N.W.2d 141 (S.D. 1987).
Wyo.—*Ayers v. State*, 949 P.2d 469 (Wyo. 1997).
- 4 Ariz.—*State v. Howell*, 109 Ariz. 165, 506 P.2d 1059 (1973).
- 5 U.S.—U. S. ex rel. *Montgomery v. People of State of Ill.*, 473 F.2d 1382 (7th Cir. 1973).
No particular litany during plea colloquy required
N.Y.—*People v. Belliard*, 20 N.Y.3d 381, 961 N.Y.S.2d 820, 985 N.E.2d 415 (2013).
- 6 Tex.—*Drake v. State*, 756 S.W.2d 43 (Tex. App. Texarkana 1988).
- 7 U.S.—*Schaffner v. Greco*, 458 F. Supp. 202 (S.D. N.Y. 1978).
- 8 U.S.—*Neeley v. Duckworth*, 473 F. Supp. 288 (N.D. Ind. 1979).
Md.—*State v. Priet*, 289 Md. 267, 424 A.2d 349 (1981).
Formal ritual not required
Okla.—*Carpenter v. State*, 1996 OK CR 56, 929 P.2d 988 (Okla. Crim. App. 1996).
- 9 Wash.—*State v. Kender*, 21 Wash. App. 622, 587 P.2d 551 (Div. 2 1978).
- 10 U.S.—*Mabry v. Johnson*, 467 U.S. 504, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984) (disapproved of on other grounds by, *Puckett v. U.S.*, 556 U.S. 129, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009)); U.S. v. *Avila*, 733 F.3d 1258 (10th Cir. 2013).
Colo.—*People v. Birdsong*, 958 P.2d 1124 (Colo. 1998).
No requirement to advise of deportation consequences of plea
Iowa.—*State v. Ramirez*, 636 N.W.2d 740 (Iowa 2001).
Direct consequences of guilty plea
A direct consequence of a guilty plea, of which due process requires a defendant be advised prior to pleading guilty, is one which has a definite, immediate, and largely automatic effect on the defendant's punishment.
N.Y.—*People v. Peque*, 22 N.Y.3d 168, 980 N.Y.S.2d 280, 3 N.E.3d 617 (2013).
N.C.—*State v. Smith*, 352 N.C. 531, 532 S.E.2d 773 (2000).
Collateral consequences of guilty plea
A collateral consequence of a guilty plea, of which due process does not require a defendant to be informed, are effects upon the defendant that the trial court has no authority to impose.
Ill.—*People v. Delvillar*, 235 Ill. 2d 507, 337 Ill. Dec. 207, 922 N.E.2d 330 (2009).
Immigration consequences
For purposes of due process analysis of the voluntariness of a guilty plea, possible immigration consequences constitute a collateral and not a direct consequence of a class A misdemeanor conviction.
N.H.—*State v. Ortiz*, 163 N.H. 506, 44 A.3d 425 (2012).
- 11 U.S.—U. S. ex rel. *Smith v. Baldi*, 344 U.S. 561, 73 S. Ct. 391, 97 L. Ed. 549 (1953).
Neb.—*State v. Jones*, 218 Neb. 382, 355 N.W.2d 227 (1984).
Wyo.—*Mehring v. State*, 860 P.2d 1101 (Wyo. 1993).
- 12 U.S.—*Foster v. People of State of Ill.*, 332 U.S. 134, 67 S. Ct. 1716, 91 L. Ed. 1955 (1947).
Cal.—*Ex parte Gutierrez*, 122 Cal. App. 2d 661, 265 P.2d 16 (3d Dist. 1954).
Ill.—*People v. Bassinger*, 403 Ill. 108, 85 N.E.2d 758 (1949).
- 13 U.S.—U.S. v. *Ward*, 518 F.3d 75 (1st Cir. 2008); U.S. v. *Tidwell*, 521 F.3d 236 (3d Cir. 2008).
Fla.—*Sanchez-Torres v. State*, 130 So. 3d 661 (Fla. 2013), cert. denied, 134 S. Ct. 1296, 188 L. Ed. 2d 321 (2014).
Ky.—*Dunlap v. Com.*, 435 S.W.3d 537 (Ky. 2013).
S.C.—*State v. Nesbitt*, 411 S.C. 194, 768 S.E.2d 67 (2015).
Colloquy required
Mass.—*Com. v. Evelyn*, 26 N.E.3d 158 (Mass. 2015).
Defendant's burden
To survive a due process challenge, a plea must be knowing, voluntary, and intelligently entered, and the defendant bears the burden of proving that a plea did not meet those requirements.
U.S.—*Warren v. Baenen*, 712 F.3d 1090 (7th Cir. 2013).

Voluntary and intelligent choice among available alternatives

Ohio—*State v. Kostyuchenko*, 2014-Ohio-324, 8 N.E.3d 353 (Ohio Ct. App. 1st Dist. Hamilton County 2014).

N.Y.—*People v. Belliard*, 20 N.Y.3d 381, 961 N.Y.S.2d 820, 985 N.E.2d 415 (2013).

Tenn.—*Bush v. State*, 428 S.W.3d 1 (Tenn. 2014).

Defendant must have full knowledge of consequences

Ill.—*People v. Burns*, 405 Ill. App. 3d 40, 342 Ill. Dec. 915, 933 N.E.2d 1208 (2d Dist. 2010).

Fla.—*Bolware v. State*, 995 So. 2d 268 (Fla. 2008).

Iowa—*State v. Finney*, 834 N.W.2d 46 (Iowa 2013).

S.D.—*Spirit Track v. State*, 272 N.W.2d 803 (S.D. 1978).

Explicit waiver of each right not required

It is not necessary that each waiver of a defendant's rights be explicit as long as the plea was voluntary and intelligent.

U.S.—*U.S. v. Diaz-Ramirez*, 646 F.3d 653 (9th Cir. 2011).

Sentencing

(1) With respect to sentencing, the due process requirement that a defendant be advised and understand the consequences of a guilty plea means that the defendant must know the maximum prison term and fine for the offense charged.

U.S.—*Burton v. Terrell*, 576 F.3d 268 (5th Cir. 2009).

(2) Due process and the governing Idaho criminal rule requires that a defendant be informed, prior to the entry of a guilty plea, of the minimum and maximum potential sentence, not of the actual sentence that the court will impose within that range.

Idaho—*Steele v. State*, 153 Idaho 783, 291 P.3d 466 (Ct. App. 2012).

Information from accused

The Due Process Clause requires a court to obtain from a defendant who pleads guilty to serious criminal charges information showing that the plea is voluntarily and knowingly made.

Me.—*State v. Beal*, 446 A.2d 405, 31 A.L.R.4th 493 (Me. 1982).

U.S.—*McCarthy v. U.S.*, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969); *Duperry v. Kirk*, 563 F. Supp. 2d 370 (D. Conn. 2008).

Ariz.—*State v. Anderson*, 147 Ariz. 346, 710 P.2d 456 (1985).

Iowa—*Kyle v. State*, 364 N.W.2d 558 (Iowa 1985).

Affirmative showing required

Tenn.—*Bush v. State*, 428 S.W.3d 1 (Tenn. 2014).

Where defendant unaware of rights

A plea is "involuntary," and thus violates due process, where the defendant did not have knowledge of nature of constitutional protections he or she will forgo by entering his or her plea.

U.S.—*Brown v. U.S.*, 637 F. Supp. 2d 212 (S.D. N.Y. 2009).

U.S.—*U.S. v. Escamilla-Rojas*, 640 F.3d 1055 (9th Cir. 2011).

S.D.—*State v. Anderson*, 2013 SD 36, 831 N.W.2d 54 (S.D. 2013).

Tenn.—*Garcia v. State*, 425 S.W.3d 248 (Tenn. 2013).

Accused must be advised of constitutional rights being waived

S.C.—*Anderson v. State*, 342 S.C. 54, 535 S.E.2d 649 (2000).

U.S.—*McCarthy v. U.S.*, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969); *Tovar Mendoza v. Hatch*, 620 F.3d 1261 (10th Cir. 2010); *U.S. v. Rodriguez*, 751 F.3d 1244 (11th Cir. 2014), cert. denied, 135 S. Ct. 310, 190 L. Ed. 2d 225 (2014).

Conn.—*In re Jason C.*, 255 Conn. 565, 767 A.2d 710 (2001).

D.C.—*Edwards v. U.S.*, 766 A.2d 981 (D.C. 2001).

Mich.—*People v. Cole*, 491 Mich. 325, 817 N.W.2d 497 (2012).

N.J.—*State ex rel. T.M.*, 166 N.J. 319, 765 A.2d 735 (2001).

Defendant may withdraw plea as matter of right

Wis.—*State v. Taylor*, 2013 WI 34, 347 Wis. 2d 30, 829 N.W.2d 482 (2013).

U.S.—*Bousley v. U.S.*, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998); *U.S. v. Ochoa-Gonzalez*, 598 F.3d 1033 (8th Cir. 2010).

D.C.—*Upshur v. U.S.*, 742 A.2d 887 (D.C. 1999).

Conn.—*State v. Dzwonkowski*, 151 Conn. App. 81, 94 A.3d 657 (2014), certification denied, 314 Conn. 906, 100 A.3d 401 (2014).

Idaho—*State v. Gonzales*, 158 Idaho 112, 343 P.3d 1119 (Ct. App. 2015).

Wash.—*State v. Webb*, 183 Wash. App. 242, 333 P.3d 470 (Div. 2 2014), review denied, 182 Wash. 2d 1005, 342 P.3d 327 (2015).

What constitutes real notice

The defendant receives real notice of the charge, as required to satisfy the due process requirement that a plea be voluntary, when he or she has been informed of both the nature of the charge to which he or she is pleading guilty and its elements.

U.S.—*Hicks v. Franklin*, 546 F.3d 1279 (10th Cir. 2008).

Determination of voluntariness

To determine whether a plea was knowing and voluntary, and thus in compliance with due process requirements, the court must look at all of the relevant circumstances surrounding it to determine if the defendant had full awareness of the plea's direct consequences, real notice of the true nature of the charge against him or her, and understand the law in relation to the facts.

U.S.—*Warren v. Baenen*, 712 F.3d 1090 (7th Cir. 2013).

19 U.S.—*Overstreet v. Wilson*, 686 F.3d 404 (7th Cir. 2012), cert. denied, 133 S. Ct. 2735, 186 L. Ed. 2d 195 (2013).

Mo.—*Lynn v. State*, 417 S.W.3d 789 (Mo. Ct. App. E.D. 2013), reh'g and/or transfer denied, (Nov. 19, 2013) and transfer denied, (Feb. 4, 2014).

Wis.—*State v. Cain*, 2012 WI 68, 342 Wis. 2d 1, 816 N.W.2d 177 (2012).

Alford plea

When a defendant pleads guilty under *North Carolina v. Alford*, constitutional due process requires that the record contain strong evidence of actual guilt.

La.—*State v. Lyons*, 128 So. 3d 407 (La. Ct. App. 5th Cir. 2013).

20 U.S.—*Roddy v. Black*, 516 F.2d 1380 (6th Cir. 1975); *Overstreet v. Wilson*, 686 F.3d 404 (7th Cir. 2012), cert. denied, 133 S. Ct. 2735, 186 L. Ed. 2d 195 (2013).

21 U.S.—*Knapp v. Singletary*, 864 F. Supp. 1186 (M.D. Fla. 1994).

Colo.—*Lacy v. People*, 775 P.2d 1 (Colo. 1989).

La.—*State v. Bass*, 47 So. 3d 541 (La. Ct. App. 2d Cir. 2010), writ denied, 58 So. 3d 457 (La. 2011).

22 N.M.—*State v. Ortiz*, 1967-NMSC-104, 77 N.M. 751, 427 P.2d 264 (1967).

23 N.M.—*State v. McClarron*, 85 N.M. 442, 1973-NMCA-104, 512 P.2d 1278 (Ct. App. 1973).

24 U.S.—*Fluitt v. Superintendent, Green Haven Correctional Facility*, 480 F. Supp. 81 (S.D. N.Y. 1979).

25 U.S.—*Gallegos v. State of Neb.*, 342 U.S. 55, 72 S. Ct. 141, 96 L. Ed. 86 (1951).

As to matters to be considered in determining whether due process has been violated in the admission of confessions into evidence, see § 1672.

26 Ill.—*People v. Miller*, 107 Ill. App. 3d 1078, 63 Ill. Dec. 712, 438 N.E.2d 643 (1st Dist. 1982).

27 U.S.—*U.S. v. Krasn*, 614 F.2d 1229, 6 Fed. R. Evid. Serv. 221 (9th Cir. 1980).

28 Ala.—*Polarie v. State*, 396 So. 2d 136 (Ala. Crim. App. 1981).

29 Mo.—*State v. Jackson*, 514 S.W.2d 638 (Mo. Ct. App. 1974).

30 U.S.—*U. S. ex rel. Brooks v. McMann*, 408 F.2d 823 (2d Cir. 1969).

31 Wis.—*State v. Rivest*, 106 Wis. 2d 406, 316 N.W.2d 395 (1982).

32 U.S.—*U.S. v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968).

Mass.—*Huot v. Com.*, 363 Mass. 91, 292 N.E.2d 700 (1973).

Mont.—*State v. Sather*, 172 Mont. 428, 564 P.2d 1306 (1977).

33 U.S.—*U.S. v. Malcolm*, 432 F.2d 809 (2d Cir. 1970).

Wis.—*Jones v. State*, 71 Wis. 2d 750, 238 N.W.2d 741 (1976).

34 U.S.—*Uveges v. Com. of Pa.*, 335 U.S. 437, 69 S. Ct. 184, 93 L. Ed. 127 (1948).

Ill.—*People v. Williams*, 399 Ill. 452, 78 N.E.2d 512, 3 A.L.R.2d 999 (1948).

Va.—*McDorman v. Smyth*, 188 Va. 474, 50 S.E.2d 423 (1948).

35 Ind.—*Harshman v. State*, 232 Ind. 618, 115 N.E.2d 501 (1953).

Pa.—*Com. ex rel. Sheeler v. Burke*, 367 Pa. 152, 79 A.2d 654 (1951).

36 N.J.—*State v. Cynkowski*, 10 N.J. 571, 92 A.2d 782 (1952).

- 37 Conn.—*State v. Johnson*, 253 Conn. 1, 751 A.2d 298 (2000).
Vt.—*In re Hemingway*, 168 Vt. 569, 716 A.2d 806 (1998).
A.L.R. Library
Compliance with federal constitutional requirement that guilty pleas be made voluntarily and with understanding, in federal cases involving allegedly mentally incompetent state convicts, 38 A.L.R. Fed. 238.
- 38 Me.—*State v. Boone*, 444 A.2d 438 (Me. 1982).
- 39 U.S.—*Hill v. Estelle*, 653 F.2d 202 (5th Cir. 1981).
- 40 U.S.—*Tovar Mendoza v. Hatch*, 620 F.3d 1261 (10th Cir. 2010).
- 41 Ill.—*People v. Davis*, 403 Ill. App. 3d 461, 343 Ill. Dec. 226, 934 N.E.2d 550 (1st Dist. 2010).
- 42 N.Y.—*People v. Turner*, 24 N.Y.3d 254, 997 N.Y.S.2d 671, 22 N.E.3d 179 (2014).
- 43 N.Y.—*People v. Peque*, 22 N.Y.3d 168, 980 N.Y.S.2d 280, 3 N.E.3d 617 (2013).
- 44 U.S.—*Bousley v. U.S.*, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

D. Indictment or Information; Arraignment and Plea

2. Arraignment and Plea

§ 1646. Constitutional rights with respect to plea bargaining

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Due process requires that the prosecutor adhere to the terms of a plea bargain agreement, and a failure to fulfill a promise which is part of or has induced a plea bargain deprives an accused of due process.

Due process requires that the prosecutor adhere to the terms of a plea bargain agreement,¹ and a failure to fulfill a promise which is part of or has induced a plea bargain deprives an accused of due process² unless it has been withdrawn prior to any detrimental reliance on it by means of a guilty plea.³ Since an accused does not have a constitutional right to plea bargain, however, a failure to enforce a plea proposal, as opposed to an "accepted" offer, does not violate due process.⁴ Moreover, if the State is only to recommend a punishment pursuant to a plea bargain, due process does not require that a disappointed accused be allowed to withdraw his or her plea.⁵

The conduct of the prosecutor in threatening to file, or in actually filing, a habitual criminal charge against an accused if he or she refuses to accept a plea arrangement does not violate due process.⁶ Likewise, due process is not violated by requiring an accused, as part of a plea bargain, to admit to other uncharged offenses to provide additional information to be considered in determining

the punishment to be assessed.⁷ A delay in the State's attempt to avoid a plea agreement, which is attributable to procedures taken to protect the accused's due process rights under the plea agreement, does not violate due process.⁸ However, a vindictive, retaliatory, or punitive use of otherwise unobjectionable procedures in plea bargaining offends due process requirements.⁹

While the trial court is generally bound by due process to honor an accepted plea agreement,¹⁰ due process principles do not invariably demand that specific performance of a plea bargain be ordered, and state courts retain a wide discretion to fashion the appropriate remedy.¹¹ A trial court may not, however, consistent with the requirements of due process, participate in a plea bargain.¹²

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Footnotes

- 1 U.S.—*U.S. v. Lara-Ruiz*, 681 F.3d 914 (8th Cir. 2012); *U.S. v. Hill*, 643 F.3d 807, 85 Fed. R. Evid. Serv. 714 (11th Cir. 2011).
Cal.—*People v. Villalobos*, 54 Cal. 4th 177, 141 Cal. Rptr. 3d 491, 277 P.3d 179 (2012).
Haw.—*State v. Miller*, 122 Haw. 92, 223 P.3d 157 (2010), as corrected, (Feb. 4, 2010).
Md.—*Solorzano v. State*, 397 Md. 661, 919 A.2d 652 (2007).
Strict adherence required
Due process requires strict adherence to a plea agreement, and this strict adherence requires holding the State to a greater degree of responsibility than the defendant for imprecisions or ambiguities in plea agreements.
N.C.—*State v. King*, 218 N.C. App. 384, 721 S.E.2d 327 (2012).
Contract law principles applicable
(1) Principles of contract law and special due process concerns for fairness govern the court's interpretation of plea agreements.
U.S.—*U.S. v. Guyton*, 37 F. Supp. 3d 840 (E.D. La. 2014).
Conn.—*State v. Rivers*, 283 Conn. 713, 931 A.2d 185 (2007).
(2) Although the court of appeals construes plea agreements as contracts, the court regards plea agreements as unique contracts in which special due process concerns for fairness and the adequacy of procedural safeguards obtain.
U.S.—*U.S. v. Adkins*, 743 F.3d 176 (7th Cir. 2014).
D.C.—*Royce v. U.S.*, 772 A.2d 837 (D.C. 2001).
Kan.—*State v. Urista*, 296 Kan. 576, 293 P.3d 738 (2013).
Minn.—*State v. Wukawitz*, 662 N.W.2d 517 (Minn. 2003).
Accused has due process right to enforcement of negotiated plea agreement
Wis.—*State v. Bokenyi*, 2014 WI 61, 355 Wis. 2d 28, 848 N.W.2d 759 (2014).
Defendant must show breach of plea agreement affected sentence
To show the government's breach of a plea agreement affected defendant's due process rights, he or she must show that his or her sentence was affected by the breach.
U.S.—*U.S. v. Sayles*, 754 F.3d 564 (8th Cir. 2014).
Addition of mandatory supervised release to negotiated sentence
Without a proper admonition, adding mandatory supervised release (MSR) to a defendant's negotiated sentence amounts to a unilateral modification and breach of the plea agreement by the State, inconsistent with constitutional concerns of due process and fundamental fairness.
Ill.—*People v. Santana*, 401 Ill. App. 3d 663, 341 Ill. Dec. 665, 931 N.E.2d 273 (2d Dist. 2010).
A.L.R. Library
Choice of Remedies Where State Prosecutor Has Breached Plea Bargain, 9 A.L.R.6th 541.
3 Wis.—*State v. Beckes*, 100 Wis. 2d 1, 300 N.W.2d 871 (Ct. App. 1980).
Showing required
To establish detrimental reliance on a trial court's misinformation or a governmental promise, the accused must show that he or she performed some tangible act, or relinquished some significant right, in reliance

upon the promise and that the act or relinquishment so induced was detrimental to the accused's right to fair treatment and due process.

Colo.—[People v. Emert](#), 240 P.3d 514 (Colo. App. 2010).

Wash.—[State v. Yates](#), 161 Wash. 2d 714, 168 P.3d 359 (2007).

Tex.—[McGuire v. State](#), 617 S.W.2d 259 (Tex. Crim. App. 1981).

U.S.—[Bordenkircher v. Hayes](#), 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

Ind.—[Norris v. State](#), 271 Ind. 568, 394 N.E.2d 144 (1979).

Wash.—[State v. Anderson](#), 23 Wash. App. 445, 597 P.2d 417 (Div. 2 1979).

Mich.—[People v. Lytle](#), 102 Mich. App. 708, 302 N.W.2d 289 (1981).

Wis.—[State v. Rivest](#), 106 Wis. 2d 406, 316 N.W.2d 395 (1982).

Mont.—[State v. Sather](#), 172 Mont. 428, 564 P.2d 1306 (1977).

La.—[State v. Chalaire](#), 375 So. 2d 107 (La. 1979).

Cal.—[People v. Calloway](#), 29 Cal. 3d 666, 175 Cal. Rptr. 596, 631 P.2d 30 (1981).

Discretion of court

The notion of fundamental fairness embodied in due process implies that whatever promises the government makes in the course of a plea agreement to induce a guilty plea must be fulfilled; the same concept of fairness ordinarily impels the court, in its discretion, either to accord specific performance of the agreement or to permit the opportunity to withdraw the guilty plea.

Conn.—[Fulton v. Commissioner of Correction](#), 126 Conn. App. 706, 12 A.3d 1058 (2011).

Pa.—[Com. v. Zakrzewski](#), 460 Pa. 528, 333 A.2d 898 (1975).

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

D. Indictment or Information; Arraignment and Plea

2. Arraignment and Plea

§ 1647. Constitutional rights with respect to insanity pleas

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4584 to 4590

There is no denial of due process where, given ample opportunity to enter a special plea of not guilty by reason of insanity, the accused fails to exercise the right within a reasonable time.

No fundamental due process right to plead not guilty by reason of insanity exists in the Constitution.¹ There is no denial of due process, but simply a failure of the accused to use the due process provided for his or her benefit, where the accused is given ample opportunity to enter a special plea of not guilty by reason of insanity, but he or she fails to exercise this right within a reasonable time.² Due process is not denied by a statute providing that, in order to raise the question of insanity, the accused must plead it in a specified manner³ and that, on making such a plea, he or she will be committed temporarily before trial to a hospital for observation and examination.⁴

Statutes providing for a double plea of not guilty and not guilty by reason of insanity, and a bifurcated trial on the issues, do not violate the due process clauses of the federal and state constitutions.⁵

CUMULATIVE SUPPLEMENT

Cases:

Statute that conditioned admissibility of expert testimony and other evidence relating to defendant's insanity on defendant's cooperation with the psychiatrist conducting the court-ordered sanity examination did not impermissibly require defendant to choose between incriminating himself or forfeiting an insanity defense nor compel defendant to make involuntary statements in violation of his due process rights, in murder prosecution, as use of defendant's statements during the sanity examination could not be introduced at trial to establish guilt, and could only be used specifically for purposes of determining the sanity issue. [U.S. Const. Amends. 5, 14](#); [Colo. Rev. Stat. Ann. § 16-8-106\(2\)\(c\)](#). [People v. Marko](#), 2015 COA 139, 434 P.3d 618 (Colo. App. 2015), judgment aff'd, 2018 CO 97, 432 P.3d 607 (Colo. 2018).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Va.—D.L.G. v. Com.](#), 60 Va. App. 77, 724 S.E.2d 208 (2012).
- 2 [U.S.—U. S. ex rel. Smith v. Baldi](#), 344 U.S. 561, 73 S. Ct. 391, 97 L. Ed. 549 (1953).
[Cal.—People v. La Crosse](#), 5 Cal. App. 2d 696, 43 P.2d 596 (1st Dist. 1935).
- 3 [U.S.—U. S. ex rel. Smith v. Baldi](#), 344 U.S. 561, 73 S. Ct. 391, 97 L. Ed. 549 (1953).
[Colo.—Ingles v. People](#), 92 Colo. 518, 22 P.2d 1109 (1933).
- 4 [Colo.—Ingles v. People](#), 92 Colo. 518, 22 P.2d 1109 (1933).
- 5 [Cal.—People v. Daugherty](#), 40 Cal. 2d 876, 256 P.2d 911 (1953).
[La.—State v. West](#), 408 So. 2d 1302 (La. 1982).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

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E. Evidence

[Topic Summary](#) | [Correlation Table](#)

Research References

A.L.R. Library

A.L.R. Index, Constitutional Law

A.L.R. Index, Due Process

A.L.R. Index, Evidence

A.L.R. Index, Fourteenth Amendment

West's A.L.R. Digest, [Constitutional Law](#)  [3855](#), [4522](#), [4632](#), [4633](#), [4650](#) to [4694](#)

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

1. In General

§ 1648. General evidentiary considerations

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4522, 4650 to 4694

Due process of law requires that the accused, after a plea of not guilty, shall not be put on his or her defense or deprived of his or her liberty until the State has produced evidence proving each element of the crime beyond a reasonable doubt.

Before any challenged evidence may be submitted to the jury, due process requires the trial judge to fully and independently resolve, as a matter of law, that the evidence was not obtained in violation of the fundamental constitutional rights of the accused.¹ Judicial discretion to exclude evidence must bow to due process,² which requires that a defendant be judged solely on the evidence adduced at trial, meaning that the jury's verdict must be supported by the evidence at trial, may not be based on information learned about the defendant that was not produced at trial and may not be based on preexisting opinions on the issue put before the jury in the case.³

Due process requires that an accused, after a plea of not guilty, not be put on his or her defense or deprived of his or her liberty until the State has produced evidence proving each element of the crime beyond a reasonable doubt.⁴

Due process is denied if a party against whom a fact is judicially noticed is not informed of the judicial notice⁵ and given an opportunity to demonstrate that the fact is not true in the case at bar.⁶ In other words, when judicial notice of an element is taken outside the context of the trial itself, the defendant is denied the due process right to confront or challenge an essential fact establishing an element, whether or not the fact is indisputable.⁷

Difficult evidentiary decisions do not in and of themselves violate a defendant's due process right to present a defense.⁸ Erroneous evidentiary rulings, however, can, in combination, rise to the level of a due process violation.⁹

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Footnotes

- 1 N.Y.—*Gannett Co., Inc. v. De Pasquale*, 43 N.Y.2d 370, 401 N.Y.S.2d 756, 372 N.E.2d 544 (1977), judgment aff'd, 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979).
- 2 U.S.—*Morales v. Scribner*, 621 F. Supp. 2d 808 (N.D. Cal. 2008).
- 3 Wis.—*State v. Kiernan*, 227 Wis. 2d 736, 596 N.W.2d 760 (1999).
- 4 Cal.—*People v. Kobrin*, 11 Cal. 4th 416, 45 Cal. Rptr. 2d 895, 903 P.2d 1027 (1995).
Wash.—*In re Hinton*, 152 Wash. 2d 853, 100 P.3d 801 (2004).
Wis.—*State v. Harvey*, 2002 WI 93, 254 Wis. 2d 442, 647 N.W.2d 189 (2002).
As to the burden of proof and the reasonable doubt standard, see §§ 1656, 1657.
- 5 Neb.—*State v. Linn*, 248 Neb. 809, 539 N.W.2d 435 (1995).
- 6 Ind.—*Sumpter v. State*, 264 Ind. 117, 340 N.E.2d 764 (1976).
- 7 U.S.—*U.S. v. Paul*, 73 M.J. 274 (C.A.A.F. 2014).
- 8 Ind.—*Bisard v. State*, 26 N.E.3d 1060 (Ind. Ct. App. 2015).
- 9 Wis.—*State v. Gonzalez*, 2011 WI 63, 335 Wis. 2d 270, 802 N.W.2d 454 (2011).

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XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

1. In General

§ 1649. Rules of evidence

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4522, 4650 to 4694

Due process is a limitation on the power of a legislature in the enactment of statutory rules of evidence in criminal cases. However, within proper limits, the legislature may, without denial of due process of law, establish and alter the rules relating to the admission and effect of evidence in criminal cases.

The constitutional guaranty of due process requires adherence to the adopted and recognized rules of evidence in trials,¹ and proper application of the statutory rules of evidence ordinarily does not impermissibly infringe upon a defendant's due process rights.² This is so because the courts retain intrinsic power under state law to exercise discretion to control the admission of evidence at trial.³

A defendant's due process right to present evidence in a criminal action does not prevent the court from following evidentiary rules that are designed to assure both fairness and reliability in the ascertainment of guilt and innocence.⁴ In fact, so long as the rules of evidence are not applied arbitrarily or disproportionately to defeat the purpose it is designed to serve, the rules do not

violate a defendant's due process rights.⁵ On the other hand, a defendant's right to due process can be violated by strict rules of evidence that prevent a defendant from presenting clearly exculpatory evidence to the jury.⁶

The due process guaranty, whenever applicable, is a limitation on the power of a legislature in the enactment of rules of evidence in criminal cases.⁷ Nevertheless, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.⁸ In other words, within proper limits, the legislature may, without denial of due process of law, establish and alter the rules relating to the admission and effect of evidence in criminal cases.⁹ However, their discretion ends where an evidentiary rule adversely affects an accused's constitutional rights.¹⁰

Where a rule of evidence is reasonable in itself, and does not deprive the accused person of a reasonable opportunity to make his or her defense or to present in evidence all the facts relating to the issue, it complies with due process of law within the constitutional guaranties.¹¹ Conversely, a rule of evidence is void as a denial of due process of law where it is arbitrary or unreasonable¹² and prohibits the defendant from offering otherwise relevant, reliable evidence which is vital to his or her defense.¹³

Evidentiary errors that simply involve violations of the rules of evidence do not implicate constitutional considerations unless the error results in the defendant being deprived of his or her due process right to a fair trial in a fair tribunal.¹⁴

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Footnotes

- 1 U.S.—*McKinney v. U.S.*, 222 F.2d 361 (9th Cir. 1955).
Cal.—*People v. Schubert*, 71 Cal. App. 2d 773, 163 P.2d 498 (3d Dist. 1945).
As to due process as including the accused's right to be heard, see § 1610.
- 2 Cal.—*People v. Ardoin*, 196 Cal. App. 4th 102, 130 Cal. Rptr. 3d 1 (1st Dist. 2011).
Theory of the case
Although a criminal defendant has a due process right to introduce into evidence any testimony or documentation which would tend to prove the defendant's theory of the case, that right is subject to the rules of evidence.
Nev.—*Fields v. State*, 125 Nev. 785, 220 P.3d 709 (2009).
- 3 Cal.—*People v. Abilez*, 41 Cal. 4th 472, 61 Cal. Rptr. 3d 526, 161 P.3d 58 (2007), as modified, (Aug. 22, 2007).
- 4 Iowa—*State v. Countryman*, 573 N.W.2d 265 (Iowa 1998).
- 5 U.S.—*Rogers v. Wong*, 637 F. Supp. 2d 807 (E.D. Cal. 2009).
Tenn.—*State v. Ackerman*, 397 S.W.3d 617 (Tenn. Crim. App. 2012).
- 6 *Ross v. District Attorney of the County of Allegheny*, 672 F.3d 198 (3d Cir. 2012).
- 7 U.S.—*Tot v. U.S.*, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943).
- 8 U.S.—*Morales v. Scribner*, 621 F. Supp. 2d 808 (N.D. Cal. 2008).
- 9 U.S.—*Montana v. Egelhoff*, 518 U.S. 37, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996).
Md.—*Bremer v. State*, 18 Md. App. 291, 307 A.2d 503 (1973).
N.J.—*State v. Roma*, 140 N.J. Super. 582, 357 A.2d 45 (Law Div. 1976), opinion supplemented, 143 N.J. Super. 504, 363 A.2d 923 (Law Div. 1976).
- 10 U.S.—*Alim v. Smith*, 474 F. Supp. 54 (W.D. N.Y. 1979).
- 11 Ga.—*Johnson v. State*, 203 Ga. 147, 45 S.E.2d 616 (1947).
N.C.—*State v. Lassiter*, 13 N.C. App. 292, 185 S.E.2d 478 (1971).
S.C.—*State v. Brown*, 178 S.C. 294, 182 S.E. 838 (1935).
- 12 N.J.—*State v. Roma*, 140 N.J. Super. 582, 357 A.2d 45 (Law Div. 1976), opinion supplemented, 143 N.J. Super. 504, 363 A.2d 923 (Law Div. 1976).

- 13 Tex.—[Wiley v. State](#), 74 S.W.3d 399 (Tex. Crim. App. 2002).
- 14 Tex.—[Kappel v. State](#), 402 S.W.3d 490 (Tex. App. Houston 14th Dist. 2013).
- Idaho—[State v. Dunlap](#), 155 Idaho 345, 313 P.3d 1 (2013).

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XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

1. In General

§ 1650. Use of perjured or falsified evidence

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4632, 4633

A conviction violates due process if it is obtained by the use of perjured testimony which the prosecution knows to be false or later discovers to be false and allows it to go uncorrected, if there is any reasonable likelihood that false testimony could have affected the judgment of the jury.

A defendant has no due process or other constitutional right to present perjured testimony.¹

The State's knowing use of perjured testimony to obtain a criminal conviction violates due process.² Under principles of due process, the prosecution cannot present evidence it knows is false and must correct any falsity of which it becomes aware,³ even if the false evidence was not intentionally submitted,⁴ or the State did not solicit the false testimony.⁵

To establish a violation of due process in a prosecutor's use of false testimony, the defendant must show that the testimony was false,⁶ that the prosecutor⁷ or a representative or agent of the prosecution⁸ knew or believed it to be false, and that the testimony was material⁹ or that it went to the credibility of a witness.¹⁰

Mere confusion or inconsistency in a witness's testimony is insufficient to show a due process violation¹¹ where the confusion is clearly pointed out to the jury on cross-examination.¹²

False evidence is material for this purpose if there is any reasonable likelihood or probability that the false testimony could have affected jury's verdict,¹³ or unless a reviewing court is convinced beyond a reasonable doubt that the perjury did not contribute to conviction or punishment.¹⁴ A reasonable probability is one that undermines a reviewing court's confidence in the outcome of the trial.¹⁵ It is dependent on totality of relevant circumstances, and determined objectively.¹⁶

Where prosecutors unjustifiably use inconsistent and irreconcilable factual theories to convict two people of a crime only one could have committed or to obtain harsher sentences for both on the basis of an act only one could have committed, and where the probable truth of the situation can be determined, only the defendant prejudiced by the false attribution is entitled to relief for the due process violation.¹⁷

CUMULATIVE SUPPLEMENT

Cases:

In order to establish a denial of due process as a result of the introduction of false testimony, a petitioner must show: (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false. [U.S.C.A. Const.Amend. 14. Etherton v. Rivard, 800 F.3d 737 \(6th Cir. 2015\).](#)

State did not violate defendant's due process rights through use of coerced or perjured testimony in Illinois first-degree murder prosecution, even if witness who testified that he had seen defendant shooting into car recanted testimony after trial, where state neither directed the testimony nor knew that witness was allegedly lying about defendant's involvement. [U.S. Const. Amend. 5. Weaver v. Nicholson, 892 F.3d 878 \(7th Cir. 2018\).](#)

The Fourteenth Amendment's Due Process Clause prevents the government from knowingly using perjured or false testimony at trial. [U.S. Const. Amend. 14. Farrar v. Raemisch, 924 F.3d 1126 \(10th Cir. 2019\).](#)

Improper suggestions, insinuations and, especially, assertions of personal knowledge which, taken as a whole, give the jury a false impression, constitute false testimony, for the purposes of determining whether a conviction was procured in violation of due process. [U.S. Const. Amend. 14. Ex parte De La Cruz, 466 S.W.3d 855 \(Tex. Crim. App. 2015\).](#)

Instructions that misstate reasonable doubt or shift the burden of proof to the defendant are constitutional errors, and the error arises from the fundamental constitutional due process requirement that the State bear the burden of proving every element of a crime beyond a reasonable doubt. [U.S.C.A. Const.Amend. 6. State v. Kalebaugh, 183 Wash. 2d 578, 355 P.3d 253 \(2015\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 Md.—[Archer v. State, 383 Md. 329, 859 A.2d 210 \(2004\).](#)
- 2 U.S.—[U.S. v. Rodriguez, 766 F.3d 970 \(9th Cir. 2014\).](#)
Ga.—[Wimes v. State, 293 Ga. 361, 744 S.E.2d 787 \(2013\).](#)

Ill.—*People v. Wright*, 2013 IL App (1st) 103232, 369 Ill. Dec. 406, 986 N.E.2d 719 (App. Ct. 1st Dist. 2013), appeal pending, (May 1, 2013).

U.S.—*Giglio v. U.S.*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

Cal.—*People v. Bryant*, 60 Cal. 4th 335, 178 Cal. Rptr. 3d 185, 334 P.3d 573 (2014), petition for certiorari filed, 135 S. Ct. 1841 (2015).

D.C.—*Woodall v. U.S.*, 842 A.2d 690 (D.C. 2004).

Failure to correct false testimony

State's failure to correct witness' false testimony that she had not been promised anything in exchange for her testimony against defendant violated defendant's right to due process and warranted new trial on murder charges.

Ill.—*People v. Jimerson*, 166 Ill. 2d 211, 209 Ill. Dec. 738, 652 N.E.2d 278 (1995).

Cal.—*People v. Avila*, 46 Cal. 4th 680, 94 Cal. Rptr. 3d 699, 208 P.3d 634 (2009), as modified, (Aug. 12, 2009).

U.S.—*Jones v. Seifert*, 808 F. Supp. 2d 900 (S.D. W. Va. 2011).

Cal.—*Campbell v. Superior Court*, 159 Cal. App. 4th 635, 71 Cal. Rptr. 3d 594 (6th Dist. 2008), as modified on denial of reh'g, (Feb. 5, 2008).

Ill.—*People v. Simon*, 2011 IL App (1st) 91197, 352 Ill. Dec. 65, 953 N.E.2d 1 (App. Ct. 1st Dist. 2011), as modified, (Aug. 26, 2011).

U.S.—*U.S. v. Renzi*, 769 F.3d 731 (9th Cir. 2014).

Ala.—*Perkins v. State*, 144 So. 3d 457 (Ala. Crim. App. 2012).

Va.—*Porter v. Warden of Sussex I State Prison*, 283 Va. 326, 722 S.E.2d 534 (2012).

U.S.—*Soto v. Ryan*, 760 F.3d 947 (9th Cir. 2014), petition for certiorari filed (U.S. Apr. 20, 2015).

Fla.—*Robinson v. State*, 65 So. 3d 75 (Fla. 2d DCA 2011).

Va.—*Porter v. Warden of Sussex I State Prison*, 283 Va. 326, 722 S.E.2d 534 (2012).

Where defense counsel also knew of falsity

Defendant's due process rights were not violated by failure of State or trial judge to intervene after State's witness testified that defendant fired gun at police officer even though State and trial judge knew that government tests had established that gun had not been fired where defense counsel also knew of results of tests on gun; defense counsel could be left to propose way to protect interests of his client and try his own case.

D.C.—*Bruce v. U.S.*, 617 A.2d 986 (D.C. 1992).

Ill.—*People v. Olinger*, 176 Ill. 2d 326, 223 Ill. Dec. 588, 680 N.E.2d 321 (1997).

Imputed knowledge

Tex.—*Ex parte Castellano*, 863 S.W.2d 476 (Tex. Crim. App. 1993).

Investigating and prosecutorial personnel

Tex.—*Ex parte Fierro*, 934 S.W.2d 370 (Tex. Crim. App. 1996).

U.S.—*U.S. v. Renzi*, 769 F.3d 731 (9th Cir. 2014).

Ala.—*Perkins v. State*, 144 So. 3d 457 (Ala. Crim. App. 2012).

Tex.—*Ex Parte Weinstein*, 421 S.W.3d 656 (Tex. Crim. App. 2014).

No violation where testimony irrelevant and evidence of guilt overwhelming

Ill.—*People v. Page*, 193 Ill. 2d 120, 249 Ill. Dec. 874, 737 N.E.2d 264 (2000).

Cal.—*People v. Morrison*, 34 Cal. 4th 698, 21 Cal. Rptr. 3d 682, 101 P.3d 568 (2004).

Ill.—*People v. Steidl*, 177 Ill. 2d 239, 226 Ill. Dec. 592, 685 N.E.2d 1335 (1997).

N.H.—*State v. Bader*, 148 N.H. 265, 808 A.2d 12 (2002).

U.S.—*U.S. v. Renzi*, 769 F.3d 731 (9th Cir. 2014).

Ala.—*Perkins v. State*, 144 So. 3d 457 (Ala. Crim. App. 2012).

Cal.—*People v. Vines*, 51 Cal. 4th 830, 124 Cal. Rptr. 3d 830, 251 P.3d 943 (2011), as modified, (Aug. 10, 2011).

Ind.—*Sypniewski v. State*, 272 Ind. 657, 400 N.E.2d 1122 (1980).

U.S.—*Giglio v. U.S.*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *Manning v. Epps*, 695 F. Supp. 2d 323 (N.D. Miss. 2009), rev'd on other grounds, 688 F.3d 177 (5th Cir. 2012), cert. denied, 133 S. Ct. 1633, 185 L. Ed. 2d 620 (2013).

D.C.—*Woodall v. U.S.*, 842 A.2d 690 (D.C. 2004).

- 14 Tex.—[Johnson v. State](#), 2008 WL 1799744 (Tex. App. Dallas 2008), petition for discretionary review
refused, (Nov. 5, 2008).
- 15 Cal.—[In re Sassounian](#), 9 Cal. 4th 535, 37 Cal. Rptr. 2d 446, 887 P.2d 527 (1995).
Miss.—[Thomas v. State](#), 45 So. 3d 1217 (Miss. Ct. App. 2010).
- 16 Cal.—[In re Sassounian](#), 9 Cal. 4th 535, 37 Cal. Rptr. 2d 446, 887 P.2d 527 (1995).
- 17 Cal.—[In re Sakarias](#), 35 Cal. 4th 140, 25 Cal. Rptr. 3d 265, 106 P.3d 931 (2005).

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16C C.J.S. Constitutional Law § 1651

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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

1. In General

§ 1651. Weight and sufficiency

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4653, 4669, 4693, 4694

Generally, in criminal prosecutions, due process requires that the State prove beyond a reasonable doubt every essential element necessary to constitute the crime charged.

The sufficiency of the evidence to sustain a state criminal conviction implicates the due process clause of the Fourteenth Amendment.¹ In criminal prosecutions, due process requires that the State prove beyond a reasonable doubt every essential element necessary to constitute the crime charged.² Thus, a claim that evidence is insufficient to support a conviction as a matter of due process depends on whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.³ The defendant must be acquitted if the evidence is insufficient to support the jury's findings on each element of the offense,⁴ as a conviction based on legally insufficient evidence on any element of the charged offense constitutes a denial of due process.⁵

The fact that the case against the defendant is based on circumstantial evidence does not deny due process,⁶ particularly where the evidence clearly points toward the defendant's guilt and excludes every reasonable hypothesis other than guilt.⁷ The use

of an inference to prove a necessary element of an offense does not violate due process if the fact inferred follows beyond a reasonable doubt from the facts proved.⁸ Thus, where evidence establishes that the defendant possessed recently stolen property and there is no plausible explanation for that possession consistent with innocence, the presumption or inference arising from the possession of recently stolen goods satisfies the reasonable doubt standard and comports with due process.⁹ On the other hand, evidence is insufficient to satisfy due process, where the evidence amounts to little more than colorable speculation.¹⁰

A conviction must be supported by some evidence as to each essential element of the offense in order to satisfy due process,¹¹ and due process is violated if a conviction is totally devoid of evidentiary support.¹² However, a due process issue is raised only where a conviction is totally devoid of evidentiary support,¹³ and if there is some, or any, evidence to support the conviction, due process is not violated on the ground of insufficient evidence.¹⁴ The determination of whether a conviction is so totally devoid of evidentiary support as to render a conviction violative of due process turns not on the sufficiency of the evidence but on whether the conviction rested upon any evidence at all.¹⁵ In making that determination, the court is not required to disregard the accused's trial testimony on the relevant issue and consider only evidence presented by the State in its case, notwithstanding any motion by the accused for a directed verdict of acquittal at the close of the State's case.¹⁶ In a federal prosecution, the Due Process Clause does not require that a general guilty verdict on a multiple-object conspiracy charge be set aside if the evidence is inadequate to support a conviction as to one object.¹⁷

Constitutional and statutory provisions providing, in specified cases, that the vote of a specified number of jurors is sufficient to return a verdict does not deprive a defendant found guilty by a vote of the specified number of jurors of due process for failure to satisfy the reasonable-doubt standard.¹⁸

CUMULATIVE SUPPLEMENT

Cases:

Once a trial has occurred, the Fourth Amendment drops out, and a person challenging the sufficiency of the evidence to support both a conviction and any ensuing incarceration does so under the Due Process Clause of the Fourteenth Amendment. [U.S.C.A. Const.Amends. 4, 14. Manuel v. City of Joliet, Ill., 137 S. Ct. 911 \(2017\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 La.—[State v. Parker](#), 141 So. 3d 839 (La. Ct. App. 2d Cir. 2014).
Ohio—[State v. Scott](#), 101 Ohio St. 3d 31, 2004-Ohio-10, 800 N.E.2d 1133 (2004).
Tex.—[Gollihar v. State](#), 46 S.W.3d 243 (Tex. Crim. App. 2001).
- 2 § 1656.
- 3 U.S.—[Wright v. West](#), 505 U.S. 277, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992); [Weber v. Warden, Warren Correctional Inst.](#), 886 F. Supp. 2d 749 (S.D. Ohio 2012), judgment aff'd, 543 Fed. Appx. 516 (6th Cir. 2013).
La.—[State v. Parker](#), 141 So. 3d 839 (La. Ct. App. 2d Cir. 2014).
Nev.—[Conner v. State](#), 327 P.3d 503, 130 Nev. Adv. Op. No. 49 (Nev. 2014), petition for certiorari filed, 2015 WL 1228523 (U.S. 2015).
Under federal and state constitutions
Cal.—[People v. Young](#), 34 Cal. 4th 1149, 24 Cal. Rptr. 3d 112, 105 P.3d 487 (2005).
Conn.—[State v. Crafts](#), 226 Conn. 237, 627 A.2d 877 (1993).
- 4

- 5 La.—*State v. Parker*, 141 So. 3d 839 (La. Ct. App. 2d Cir. 2014).
Haw.—*State v. Puaoli*, 78 Haw. 185, 891 P.2d 272 (1995).
La.—*State v. Parker*, 141 So. 3d 839 (La. Ct. App. 2d Cir. 2014).
Ohio.—*State v. Thompkins*, 78 Ohio St. 3d 380, 1997-Ohio-52, 678 N.E.2d 541 (1997).
- 6 U.S.—*Hackworth v. Beto*, 434 F.2d 852 (5th Cir. 1970); *Martinez v. Patterson*, 371 F.2d 815 (10th Cir. 1966).
Mo.—*State v. Letterman*, 603 S.W.2d 951 (Mo. Ct. App. S.D. 1980).
- 7 Okla.—*Locke v. State*, 1976 OK CR 227, 554 P.2d 847 (Okla. Crim. App. 1976).
- 8 U.S.—*Barnes v. U.S.*, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).
Ill.—*People v. Velez*, 2012 IL App (1st) 101325, 359 Ill. Dec. 703, 967 N.E.2d 433 (App. Ct. 1st Dist. 2012).
Pa.—*Com. v. Sojourner*, 268 Pa. Super. 472, 408 A.2d 1100 (1978), *on reh'g*, 268 Pa. Super. 488, 408 A.2d 1108 (1979).
- 9 U.S.—*Barnes v. U.S.*, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).
Ala.—*Eldridge v. State*, 415 So. 2d 1190 (Ala. Crim. App. 1982).
N.C.—*State v. McNeill*, 54 N.C. App. 675, 284 S.E.2d 206 (1981).
- 10 Sivo v. Wall, 644 F.3d 46 (1st Cir. 2011).
- 11 U.S.—*Riffle v. King*, 302 F. Supp. 992 (N.D. W. Va. 1969).
- 12 U.S.—*Gregory v. City of Chicago*, 394 U.S. 111, 89 S. Ct. 946, 22 L. Ed. 2d 134 (1969).
Ill.—*People v. Hudson*, 65 Ill. App. 3d 422, 22 Ill. Dec. 326, 382 N.E.2d 646 (1st Dist. 1978).
N.M.—*State v. Alderete*, 91 N.M. 373, 1977-NMCA-130, 574 P.2d 592 (Ct. App. 1977).
- 13 U.S.—*Anderson v. Maggio*, 555 F.2d 447, 2 Fed. R. Evid. Serv. 106 (5th Cir. 1977); *Moore v. Duckworth*, 581 F.2d 639 (7th Cir. 1978), *judgment aff'd*, 443 U.S. 713, 99 S. Ct. 3088, 61 L. Ed. 2d 865 (1979); *Bond v. State of Okl.*, 546 F.2d 1369 (10th Cir. 1976).
- 14 U.S.—*Talavera v. Wainwright*, 547 F.2d 1238 (5th Cir. 1977); *Salter v. Johnson*, 579 F.2d 1007, 10 Ohio Op. 3d 360 (6th Cir. 1978).
Mich.—*People v. Jansson*, 116 Mich. App. 674, 323 N.W.2d 508 (1982).
- 15 U.S.—*Thompson v. City of Louisville*, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654, 80 A.L.R.2d 1355 (1960); *Fabritz v. Taurig*, 583 F.2d 697 (4th Cir. 1978); *U. S. ex rel. Jenkins v. Bookbinder*, 291 F. Supp. 87 (E.D. Pa. 1968).
- 16 U.S.—*U. S. ex rel. Lukas v. State of Del.*, 371 F. Supp. 1317 (D. Del. 1974).
- 17 U.S.—*Griffin v. U.S.*, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991).
- 18 U.S.—*Johnson v. Louisiana*, 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972).

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16C C.J.S. Constitutional Law § 1652

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

2. Presumptions, Inferences, and Burden of Proof

§ 1652. Presumptions and inferences, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4653, 4669, 4693, 4694

A state may be permitted to rely on a presumption or inference, but such evidentiary devices must satisfy due process standards.

Although a state may be entitled to rely on evidentiary devices such as presumptions or inferences in resolving factual questions,¹ common-law and statutory presumptions and inferences must satisfy due process standards,² such as the rational connection test,³ in light of present-day experience.⁴ The value of a presumption or inference rests on the strength of the connection between the elemental or ultimate fact presumed or inferred and the basic or evidentiary fact.⁵ Presumptions which are arbitrary or irrational deny due process.⁶ There is no rational connection between the evidentiary fact and the inferred fact, and the presumption or inference must be regarded as irrational or arbitrary, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.⁷ Likewise, an inference also violates due process if there is no corroborating evidence to support the leap from the basic fact to the presumed element.⁸

To satisfy due process, an inference or evidentiary presumption must not shift the burden of proof on an element of the charged crime to the defendant.⁹ Thus, to show that an evidentiary or rebuttable presumption violates the Due Process Clause, the plaintiff must show that the presumption relieves the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime.¹⁰ For example, presumptions which direct the jury to find the presence of an element of the crime when the prosecution has proved only circumstantial evidence violate this requirement,¹¹ and the legislature cannot validly command that the finding of an indictment or mere proof of the identity of the accused shall create a presumption of the existence of all the facts essential to guilt.¹²

However, the Due Process Clause does not prohibit the use as a procedural device of a permissive inference that shifts to the defendant the burden of producing some evidence contesting a fact that may otherwise be inferred, provided that the prosecution retains the ultimate burden of proof beyond a reasonable doubt,¹³ if the facts are likely to be much more easily provable by the accused than by the State, and if the nature of the charge and of the facts on which the presumption rests make it fair to call on the accused to produce the evidence.¹⁴

A jury may draw factual inferences on the basis of already-inferred facts as long as the inferences are reasonable.¹⁵

Defendant's right to present inferences.

A defendant's due process right to present a complete defense includes the right to make all legitimate arguments on the evidence, to explain the evidence, and to present all proper inferences to be drawn therefrom.¹⁶

Presumption of innocence.

The presumption of innocence is the keystone of the process which a defendant is due.¹⁷ It is a component of due process¹⁸ and may be specifically guaranteed by a state constitution.¹⁹

An accused in state court has the right to the presumption of innocence, that is, the right to be free from criminal conviction unless the State can prove guilt beyond a reasonable doubt by probative evidence adduced at trial.²⁰ The requirement of proof of guilt beyond a reasonable doubt plays a vital role in the American scheme of criminal procedure because it operates to give concrete substance to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding.²¹

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Footnotes

- 1 Ill.—*People v. Pomykala*, 203 Ill. 2d 198, 271 Ill. Dec. 230, 784 N.E.2d 784 (2003).
Wash.—*State v. Hanna*, 123 Wash. 2d 704, 871 P.2d 135 (1994).
- 2 U.S.—*Barnes v. U.S.*, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).
Haw.—*State v. Brighter*, 61 Haw. 99, 595 P.2d 1072 (1979).
Ill.—*State v. Funches*, 212 Ill. 2d 334, 288 Ill. Dec. 654, 818 N.E.2d 342 (2004).
- 3 Fla.—*State v. Rygwelski*, 899 So. 2d 498 (Fla. 2d DCA 2005).
- 4 Mo.—*J.N.C.B. v. Juvenile Officer*, 403 S.W.3d 120 (Mo. Ct. App. W.D. 2013).
- 5 Ill.—*People v. Pomykala*, 203 Ill. 2d 198, 271 Ill. Dec. 230, 784 N.E.2d 784 (2003).
- 6 U.S.—*Miskel v. Karnes*, 397 F.3d 446, 2005 FED App. 0037P (6th Cir. 2005).
Fla.—*State v. Brake*, 796 So. 2d 522 (Fla. 2001).
Ill.—*People v. Greco*, 204 Ill. 2d 400, 274 Ill. Dec. 73, 790 N.E.2d 846 (2003).

- 7 U.S.—*Leary v. U.S.*, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), judgment aff'd, 544 F.2d 1266 (5th Cir. 1977); *Liggins v. Burger*, 422 F.3d 642 (8th Cir. 2005).
- Cal.—*People v. Bedolla*, 94 Cal. App. 3d 1, 156 Cal. Rptr. 171 (1st Dist. 1979).
- 8 Ill.—*People v. Velez*, 2012 IL App (1st) 101325, 359 Ill. Dec. 703, 967 N.E.2d 433 (App. Ct. 1st Dist. 2012).
- 9 Ill.—*State v. Funches*, 212 Ill. 2d 334, 288 Ill. Dec. 654, 818 N.E.2d 342 (2004).
- Pa.—*Com. v. MacPherson*, 561 Pa. 571, 752 A.2d 384 (2000).
- Va.—*Flanagan v. Com.*, 58 Va. App. 681, 714 S.E.2d 212 (2011).
- Jury charge**
- A state is prohibited from using evidentiary presumptions in a jury charge that have the effect of relieving a state of its burden of persuasion beyond a reasonable doubt of every essential element of a crime.
- U.S.—*Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985).
- 10 U.S.—*Incredible Investments, LLC v. Fernandez-Rundle*, 28 F. Supp. 3d 1272 (S.D. Fla. 2014).
- 11 Wash.—*State v. Shipp*, 93 Wash. 2d 510, 610 P.2d 1322 (1980).
- 12 U.S.—*Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).
- 13 N.C.—*State v. Fleming*, 52 N.C. App. 563, 279 S.E.2d 29 (1981).
- Va.—*Reed v. Com.*, 62 Va. App. 270, 746 S.E.2d 81 (2013).
- Wash.—*State v. Stone*, 16 Wash. App. 457, 557 P.2d 26 (Div. 1 1976).
- 14 Minn.—*State v. Reps*, 302 Minn. 38, 223 N.W.2d 780, 78 A.L.R.3d 548 (1974).
- 15 Conn.—*State v. Crafts*, 226 Conn. 237, 627 A.2d 877 (1993).
- 16 Minn.—*State v. Caldwell*, 815 N.W.2d 512 (Minn. Ct. App. 2012).
- 17 U.S.—*U.S. v. Mostafa*, 7 F. Supp. 3d 334 (S.D. N.Y. 2014).
- 18 U.S.—*Tot v. U.S.*, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943).
- Tex.—*Jessop v. State*, 368 S.W.3d 653 (Tex. App. Austin 2012).
- W. Va.—*Pullin v. State*, 216 W. Va. 231, 605 S.E.2d 803 (2004).
- 19 W. Va.—*Pullin v. State*, 216 W. Va. 231, 605 S.E.2d 803 (2004).
- 20 Tex.—*Jessop v. State*, 368 S.W.3d 653 (Tex. App. Austin 2012).
- 21 D.C.—*Rivas v. U.S.*, 783 A.2d 125 (D.C. 2001).
- As to the standard of proof in criminal cases, see § 1656.

16C C.J.S. Constitutional Law § 1653

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

2. Presumptions, Inferences, and Burden of Proof

§ 1653. Permissive inferences

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

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To meet due process standards, a presumption in a criminal case must be no more than a permissive inference and there must be some rational connection or reasonable relationship between the fact proved and the ultimate fact to be presumed.

To meet due process standards, a presumption in a criminal case must be no more than a permissive inference,¹ and the defendant must be afforded a fair and reasonable opportunity to rebut the presumption and submit all the facts bearing on the issue to the jury.² In other words, the Due Process Clause allows permissive inferences as a procedural device that shift to a defendant the burden of producing some evidence contesting a fact that may otherwise be inferred.³ Permissive inferences do not necessarily relieve the State of its burden of persuasion, as the State is still required to persuade the jury that the proposed inference should follow from the proven facts.⁴

To justify a permissive inference, there must be some rational connection or reasonable relationship between the fact proved and the ultimate fact to be presumed.⁵ A permissive inference violates the Due Process Clause only if the suggested conclusion is

not one that reason and common sense justify in light of the proven facts before the jury.⁶ It must not undermine the factfinder's responsibility at trial to find the ultimate facts beyond a reasonable doubt.⁷ Accordingly, an inference or presumption which allows, but does not require, the trier of fact to infer an elemental fact from proof of a basic one, and that places no burden of any kind on the accused, does not violate due process unless there is no rational way the trier could make the connection permitted by the inference.⁸

To satisfy due process, the presumed fact must also be more likely than not to flow from the proved fact on which it is based,⁹ at least where the permissive inference is only part of the State's proof of an element of the charged offense, rather than the sole proof of the element.¹⁰ When a permissive presumption is the sole basis for a finding of guilt, and there is no corroborating evidence, the presumed fact must flow beyond a reasonable doubt from the proven predicate fact before use of the presumption will satisfy due process concerns.¹¹ Whether an inference meets the "more likely than not" standard must be determined on a case-by-case basis in light of the particular evidence presented to the jury in each case.¹²

The party challenging the constitutionality of an inference under the Due Process Clause must demonstrate its invalidity as applied to him or her¹³ and in the context of all evidence in the record.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

Statute stating that possession of a prescription document signed in blank "shall be prima-facie evidence of a conspiracy" to commit unauthorized distribution and dispensation of controlled substances did not violate defendant's due process right to have State prove every element of offense; language "shall be prima facie evidence" did not itself require certain inference, based on definition of "prima facie evidence," and jury instructions could be given that made clear that statutory presumption was permissive only. *U.S. Const. Amend. 14*; *Ga. Code Ann. § 16-13-41(h)*. *Hourin v. State*, 804 S.E.2d 388 (Ga. 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Nelson v. Solem*, 490 F. Supp. 481 (D.S.D. 1980), order aff'd, 640 F.2d 133 (8th Cir. 1981).
Neb.—*State v. Parks*, 245 Neb. 511 N.W.2d 774 (1994).
Wis.—*Muller v. State*, 94 Wis. 2d 450, 289 N.W.2d 570 (1980).
Criminal intent
Statute providing that any evidence of organized or integrated conduct could suffice to establish criminal intent in deliberate homicide beyond reasonable doubt established permissive inference, not conclusive presumption violative of due process.
Mont.—*State v. Cowan*, 260 Mont. 510, 861 P.2d 884 (1993).
2 U.S.—*U.S. v. Gainey*, 380 U.S. 63, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965).
3 Va.—*Reed v. Com.*, 62 Va. App. 270, 746 S.E.2d 81 (2013).
4 U.S.—*Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985).
Va.—*Dobson v. Com.*, 260 Va. 71, 531 S.E.2d 569 (2000).
Wash.—*State v. Deal*, 128 Wash. 2d 693, 911 P.2d 996 (1996).
5 Cal.—*People v. Mendoza*, 24 Cal. 4th 130, 99 Cal. Rptr. 2d 485, 6 P.3d 150 (2000).
Ill.—*People v. Greco*, 204 Ill. 2d 400, 274 Ill. Dec. 73, 790 N.E.2d 846 (2003).
Mo.—*J.N.C.B. v. Juvenile Officer*, 403 S.W.3d 120 (Mo. Ct. App. W.D. 2013).

Reasonable inferences

Factual inferences supporting guilty verdict need only be reasonable.

Conn.—[State v. Crafts](#), 226 Conn. 237, 627 A.2d 877 (1993).

Intent to distribute

Testimony by State's expert that he had never seen anyone purchase 12 grams of cocaine, worth approximately \$1,200 to \$2,400 on street, for personal use only, together with evidence that defendant had over \$700 in cash on his person when arrested, gave jurors rational basis for inferring defendant intended to distribute cocaine.

La.—[State v. Robertson](#), 680 So. 2d 1165 (La. 1996).

Ala.—[Townes v. State](#), 2014 WL 2677634 (Ala. Crim. App. 2014).

Cal.—[People v. Wiidanen](#), 201 Cal. App. 4th 526, 135 Cal. Rptr. 3d 736 (3d Dist. 2011).

Mo.—[J.N.C.B. v. Juvenile Officer](#), 403 S.W.3d 120 (Mo. Ct. App. W.D. 2013).

[State v. Rounds](#), 189 Vt. 447, 2011 VT 39, 22 A.3d 477 (2011).

Conn.—[State v. Truppi](#), 182 Conn. 449, 438 A.2d 712 (1980).

Fla.—[State v. Rygwelski](#), 899 So. 2d 498 (Fla. 2d DCA 2005).

Me.—[State v. McNally](#), 443 A.2d 56 (Me. 1982).

As to the burden of proof as affected by the use of presumptions in criminal cases, see § 1656.

U.S.—[Liggins v. Burger](#), 422 F.3d 642 (8th Cir. 2005).

Fla.—[State v. Rygwelski](#), 899 So. 2d 498 (Fla. 2d DCA 2005).

Mo.—[J.N.C.B. v. Juvenile Officer](#), 403 S.W.3d 120 (Mo. Ct. App. W.D. 2013).

Wash.—[State v. Cantu](#), 156 Wash. 2d 819, 132 P.3d 725 (2006), as amended, (May 26, 2006).

Ill.—[People v. Greco](#), 204 Ill. 2d 400, 274 Ill. Dec. 73, 790 N.E.2d 846 (2003).

Wash.—[State v. Hanna](#), 123 Wash. 2d 704, 871 P.2d 135 (1994).

Fla.—[State v. Rygwelski](#), 899 So. 2d 498 (Fla. 2d DCA 2005).

Ill.—[State v. Funches](#), 212 Ill. 2d 334, 288 Ill. Dec. 654, 818 N.E.2d 342 (2004).

Pa.—[Com. v. Hall](#), 574 Pa. 233, 830 A.2d 537 (2003).

16C C.J.S. Constitutional Law § 1654

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

2. Presumptions, Inferences, and Burden of Proof

§ 1654. Conclusive and mandatory presumptions

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West's Key Number Digest, [Constitutional Law](#)  4653, 4669, 4693, 4694

A mandatory presumption violates due process if it shifts to the defendant the burden of proof on an element of the crime.

The use of a conclusive or mandatory presumption violates due process if it relieves the prosecution of its burden of persuasion¹ or burden of proof by shifting the burden of proof to the defendant² and requiring him or her to rebut the presumption.³ It offends constitutional principles because it relieves the prosecutor from having to prove each element of the offense beyond a reasonable doubt.⁴ Even so, a conclusive presumption that operates as a rule of substantive law does not violate due process by lessening the prosecution's burden of proof,⁵ and the prosecution may rest its case on a mandatory presumption if the fact proved is sufficient to support an inference of guilt beyond a reasonable doubt.⁶

A mandatory presumption violates due process because it tells the triers of fact that they must find the elemental fact upon proof of the basic fact unless the defendant comes forward with some evidence to rebut the presumed connection between the two facts.⁷ Furthermore, an irrebuttable presumption is a denial of due process because it removes an element of the offense from

the jury's consideration⁸ and deprives a party of the opportunity to prove the nonexistence of an essential element of substantive offense.⁹ A conclusive presumption clashes directly with the presumption of innocence.¹⁰

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Footnotes

- 1 U.S.—*Amaya v. New Jersey*, 766 F. Supp. 2d 533 (D.N.J. 2011), *aff'd*, 455 Fed. Appx. 266 (3d Cir. 2011).
Ala.—*Townes v. State*, 2014 WL 2677634 (Ala. Crim. App. 2014).
Cal.—*People v. Goldsmith*, 59 Cal. 4th 258, 172 Cal. Rptr. 3d 637, 326 P.3d 239 (2014).
- 2 Mo.—*J.N.C.B. v. Juvenile Officer*, 403 S.W.3d 120 (Mo. Ct. App. W.D. 2013).
- 3 U.S.—*Caldwell v. Bell*, 288 F.3d 838, 2002 FED App. 0149P (6th Cir. 2002).
Fla.—*State v. Brake*, 796 So. 2d 522 (Fla. 2001).
Ill.—*People v. Watts*, 181 Ill. 2d 133, 229 Ill. Dec. 542, 692 N.E.2d 315 (1998).
Required presumption of elemental fact
Statute does not create unconstitutional conclusive presumption in violation of defendant's due process rights unless it requires trier of fact to presume from State's proof of one fact some other fact that constitutes necessary element of crime.
Wash.—*State v. Crediford*, 130 Wash. 2d 747, 927 P.2d 1129 (1996).
Rebuttable mandatory presumption
Wyo.—*Merchant v. State*, 4 P.3d 184 (Wyo. 2000).
- 4 Cal.—*People v. Laughlin*, 137 Cal. App. 4th 1020, 40 Cal. Rptr. 3d 737 (5th Dist. 2006).
- 5 Cal.—*People v. Burroughs*, 131 Cal. App. 4th 1401, 32 Cal. Rptr. 3d 729 (2d Dist. 2005).
- 6 Wash.—*State v. Hanna*, 123 Wash. 2d 704, 871 P.2d 135 (1994).
- 7 Tenn.—*State v. Pickett*, 211 S.W.3d 696 (Tenn. 2007).
- 8 Wyo.—*Merchant v. State*, 4 P.3d 184 (Wyo. 2000).
- 9 Ill.—*City of Chicago v. Hertz Commercial Leasing Corp.*, 71 Ill. 2d 333, 17 Ill. Dec. 1, 375 N.E.2d 1285 (1978).
- 10 Colo.—*People v. Stanley*, 170 P.3d 782 (Colo. App. 2007).

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16C C.J.S. Constitutional Law § 1655

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

2. Presumptions, Inferences, and Burden of Proof

§ 1655. Standard of proof

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4653, 4669, 4693, 4694

As a matter of due process, a criminal defendant cannot be convicted unless he or she is determined to be guilty beyond a reasonable doubt.

It is fundamental in the American scheme of justice¹ that in a criminal prosecution, due process forbids a conviction unless the defendant is determined to be guilty of every element of the crime charged beyond a reasonable doubt,² including intent where intent is an element of the offense.³ Due process does not require an enhanced degree of reliability, beyond the reasonable doubt standard, during the guilt determination stage of a capital prosecution.⁴

If, given all of the evidence, a rational jury would necessarily entertain a reasonable doubt as to a defendant's guilt, the due process guarantee requires that a reviewing court reverse and order a judgment of acquittal.⁵

The touchstone for determining whether a fact must be found by the jury beyond reasonable doubt is whether the fact constitutes an "element" or "ingredient" of the charged offense.⁶ Due process does not require that each subordinate conclusion established

or inferred from the evidence, or from other inferences, be proved beyond a reasonable doubt⁷ or that a general guilty verdict on a multiple-object conspiracy charge be set aside if the evidence is inadequate to support a conviction as to one object.⁸

Though the United States Constitution neither prohibits courts from defining "reasonable doubt" or requires them to do so,⁹ a trial court that does define the term must avoid defining it so as to lead the jury to convict on a lesser showing than due process requires.¹⁰ Reducing the standard of proof of an essential element of a crime to a preponderance of the evidence violates due process.¹¹

Not every fact relevant to sentencing need be proved beyond a reasonable doubt.¹²

CUMULATIVE SUPPLEMENT

Cases:

The Due Process Clause and the Sixth Amendment right to jury trial, as pillars of the Bill of Rights, ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an ancient rule that has extended down centuries. (Per Justice Gorsuch, with three Justices concurring and one Justice concurring in the judgment.) [U.S. Const. Amends. 5, 6](#). [United States v. Haymond](#), 139 S. Ct. 2369 (2019).

The Sixth Amendment right to jury trial, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt. [U.S.C.A. Const. Amends. 6, 14](#). [Hurst v. Florida](#), 136 S. Ct. 616 (2016).

To give concrete substance for the presumption of innocence, due process requires the State to persuade the factfinder beyond a reasonable doubt of every fact necessary to constitute the crime charged. [U.S. Const. Amend. 14](#). [Batchelor v. State](#), 119 N.E.3d 550 (Ind. 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Taylor v. Cate](#), 772 F.3d 842 (9th Cir. 2014).
- 2 U.S.—[Alleyne v. United States](#), 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013); [Bunkley v. Florida](#), 538 U.S. 835, 123 S. Ct. 2020, 155 L. Ed. 2d 1046 (2003); [U.S. v. Gaudin](#), 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995).
Mo.—[State v. Slocum](#), 420 S.W.3d 685 (Mo. Ct. App. E.D. 2014).
Tex.—[Rabb v. State](#), 434 S.W.3d 613 (Tex. Crim. App. 2014).
Wash.—[State v. France](#), 180 Wash. 2d 809, 329 P.3d 864 (2014).
Offense proved not offense charged
Where indictment facially charges complete offense and the State presents evidence which convicts under different theory than that alleged, conviction violates principles of due process because the State has failed to prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant was charged.
Tex.—[Thomason v. State](#), 892 S.W.2d 8 (Tex. Crim. App. 1994).
State of mind
Murder conviction founded on state of mind sufficient only to support manslaughter conviction violates due process.

Mass.—*Com. v. Vizcarrondo*, 427 Mass. 392, 693 N.E.2d 677 (1998).

In either federal or state proceedings

U.S.—*Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

Cal.—*People v. Rowland*, 4 Cal. 4th 238, 14 Cal. Rptr. 2d 377, 841 P.2d 897 (1992).

Conn.—*State v. White*, 97 Conn. App. 763, 906 A.2d 728 (2006).

Tex.—*Wilkerson v. State*, 881 S.W.2d 321 (Tex. Crim. App. 1994).

Idaho—*State v. Rhoades*, 121 Idaho 63, 822 P.2d 960 (1991), on reh'g, (Nov. 14, 1991).

Tex.—*Swearingen v. State*, 101 S.W.3d 89 (Tex. Crim. App. 2003).

U.S.—*Alleyne v. United States*, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

Conn.—*State v. Jordan*, 135 Conn. App. 635, 42 A.3d 457 (2012), judgment aff'd in part, rev'd in part on other grounds, 314 Conn. 354, 102 A.3d 1 (2014).

U.S.—*Griffin v. U.S.*, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991).

U.S.—*Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994).

Cal.—*People v. Zepeda*, 167 Cal. App. 4th 25, 83 Cal. Rptr. 3d 793 (3d Dist. 2008).

U.S.—*Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994).

Neb.—*State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995).

Kan.—*State v. Rupert*, 247 Kan. 512, 802 P.2d 511 (1990).

Wash.—*State v. Gore*, 143 Wash. 2d 288, 21 P.3d 262 (2001), as amended, (Mar. 29, 2001) and as amended, (Apr. 6, 2001) and (overruled on other grounds by, *State v. Hughes*, 154 Wash. 2d 118, 110 P.3d 192 (2005)).

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16C C.J.S. Constitutional Law § 1656

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

2. Presumptions, Inferences, and Burden of Proof

§ 1656. Burden of proof

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4653, 4669, 4693, 4694

Due process requires in a criminal trial that the prosecution prove each element of the charged offense.

Burden of proof considerations in a criminal trial implicate the Due Process Clause.¹ The burden of proof as to the elements of the charged offense is on the State.² Any shift of this burden to the defendant,³ such as by requiring him or her to disprove the existence of any element of the crime charged⁴ or otherwise relieving the State of its burden of proof⁵ violates due process.

However, a statute allocating the burden of proof in a state criminal case is not subject to proscription under the Due Process Clause if the fact that the defendant is required to prove is not determinative of an essential element of the crime charged.⁶ Due process is not violated by placing on the defendant the burden of proving a matter other than an element of the charged offense,⁷ such as mitigation, justification, excuse,⁸ or withdrawal,⁹ even if the matter was formerly an element of the crime but has been removed from the statutory definition of the crime.¹⁰ Moreover, due process does not require the State to disprove every possible fact that would mitigate or excuse the defendant's culpability.¹¹

It does not violate due process to place on the defendant the burden of production as opposed to the burden of persuasion.¹² Where a statute contains an exception which takes conduct out of the scope of the statute, it is not a denial of due process to shift to the defendant the burden of going forward with at least enough evidence to create an issue as to whether he or she is entitled to the benefit of the exception,¹³ at least where it does not require him or her to negate any facts of the crime.¹⁴

A defendant may properly be required to prove facts that are collateral and wholly independent of the crime charged.¹⁵ However, due process may be denied where the burden of production to rebut a mandatory presumption is so stringent that, in effect, it unconstitutionally shifts the burden of persuasion to the defendant.¹⁶

Due process is violated by shifting from the State to the defendant the burden of proof on the issue of intent¹⁷ or imposing on him or her the burden of rebutting a presumption of malice and unlawfulness.¹⁸ Where a defendant admits an intent to do a prohibited act, but intent is inextricably bound up with justificatory motive, the burden of proof regarding intent may not be shifted to the defendant.¹⁹

It has been held that, where the fact that a defendant acted in the heat of passion is a mitigating factor to a charge of murder, but an element of manslaughter, the State is not required to prove the absence of heat of passion before convicting the defendant of murder, although it must prove the existence of heat of passion before it may convict the defendant of manslaughter.²⁰ It has also been held, however, that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.²¹

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Footnotes

- 1 N.H.—*State v. Laurent*, 144 N.H. 517, 744 A.2d 598 (1999).
- 2 U.S.—*Bunkley v. Florida*, 538 U.S. 835, 123 S. Ct. 2020, 155 L. Ed. 2d 1046 (2003); U.S. v. *Sheehan*, 512 F.3d 621 (D.C. Cir. 2008).
Cal.—*People v. Westbrook*, 151 Cal. App. 4th 1500, 61 Cal. Rptr. 3d 138 (4th Dist. 2007).
Jury instructions relieving states of burden violate due process rights
U.S.—*Carella v. California*, 491 U.S. 263, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989).
- 3 U.S.—*Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).
D.C.—*Conley v. U.S.*, 79 A.3d 270 (D.C. 2013).
Ill.—*Flanagan v. Com.*, 58 Va. App. 681, 714 S.E.2d 212 (2011).
Va.—*Flanagan v. Com.*, 58 Va. App. 681, 714 S.E.2d 212 (2011).
- 4 U.S.—*Wilson v. Mitchell*, 498 F.3d 491 (6th Cir. 2007).
D.C.—*Hatch v. U.S.*, 35 A.3d 1115 (D.C. 2011).
Minn.—*State v. Jenkins*, 782 N.W.2d 211 (Minn. 2010).
Knowledge
As applied to criminal cases, state securities statute that prohibited sale of security by means of untrue statement of material fact, to extent it required defendant to prove that he did not know and in exercise of reasonable care could not have known of untruth of statement, improperly shifted to defendant burden of proving that he acted willfully or knowingly, in violation of Due Process Clause, and did not merely create affirmative defense.
La.—*State v. Powdrill*, 684 So. 2d 350 (La. 1996).
- 5 U.S.—*U.S. v. Jinwright*, 683 F.3d 471 (4th Cir. 2012), cert. denied, 133 S. Ct. 843, 184 L. Ed. 2d 666 (2013).
Cal.—*People v. Kobrin*, 11 Cal. 4th 416, 45 Cal. Rptr. 2d 895, 903 P.2d 1027 (1995).
Conn.—*State v. Hart*, 221 Conn. 595, 605 A.2d 1366 (1992).
- 6 Mich.—*People v. Pegenau*, 447 Mich. 278, 523 N.W.2d 325 (1994).
Statute shifting burden on essential element

A statute setting forth the offense of presence in a motor vehicle containing a firearm violates the Due Process Clause by shifting the burden of persuasion from the prosecution to the defense with respect to voluntary presence in the vehicle, an essential element of the offense.

D.C.—*Conley v. U.S.*, 79 A.3d 270 (D.C. 2013).

Conn.—*State v. Wright*, 273 Conn. 418, 870 A.2d 1039 (2005).

U.S.—*Tot v. U.S.*, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943); *U.S. v. Taylor*, 686 F.3d 182 (3d Cir. 2012), cert. denied, 133 S. Ct. 2854, 186 L. Ed. 2d 914 (2013).

Minn.—*State v. Hage*, 595 N.W.2d 200 (Minn. 1999).

Death penalty statute

Death penalty statute does not violate due process by placing burden of proving mitigating circumstances on defendant.

Pa.—*Com. v. Walker*, 540 Pa. 80, 656 A.2d 90 (1995).

U.S.—*Smith v. U.S.*, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013) (withdrawal from conspiracy).

La.—*State v. Powdrill*, 684 So. 2d 350 (La. 1996).

Malice eliminated as element of second-degree murder

Kan.—*State v. McCown*, 264 Kan. 655, 957 P.2d 401 (1998).

Wash.—*State v. W.R., Jr.*, 181 Wash. 2d 757, 336 P.3d 1134 (2014).

U.S.—*Powell v. Tompkins*, 926 F. Supp. 2d 367 (D. Mass. 2013), *aff'd*, 783 F.3d 332 (1st Cir. 2015).

Mass.—*Com. v. Gouse*, 461 Mass. 787, 965 N.E.2d 774 (2012).

Wis.—*State v. Velez*, 224 Wis. 2d 1, 589 N.W.2d 9 (1999).

U.S.—*U.S. ex rel. Corozzo v. Attorney General of State of N.Y.*, 475 F. Supp. 707 (E.D. N.Y. 1979).

Ala.—*Fiorella v. City of Birmingham*, 35 Ala. App. 384, 48 So. 2d 761 (1950).

Kan.—*State v. Carter*, 214 Kan. 533, 521 P.2d 294 (1974).

Possession of unregistered weapon

Once defendant's possession of weapon was established, inference arose that defendant had purchased or otherwise acquired a firearm from someone other than a licensed firearm dealer and, since evidence established that gun was unregistered, burden was then on defendant, without violating due process, to introduce evidence peculiarly within his knowledge concerning purchase or acquisition of weapon shortly before arrest so as to avoid registration requirement.

Ill.—*City of Chicago v. Franklin*, 126 Ill. App. 2d 43, 261 N.E.2d 506 (1st Dist. 1970).

Ohio—*State v. Frost*, 57 Ohio St. 2d 121, 11 Ohio Op. 3d 294, 387 N.E.2d 235 (1979).

U.S.—*Rodriguez v. Smith*, 428 F. Supp. 892 (S.D. N.Y. 1977).

Possession of narcotics paraphernalia

Where burden of proof beyond reasonable doubt of every element of crime was still on prosecution, statute placing upon defendant burden of showing innocent nature of his possession of narcotics paraphernalia did not violate due process.

D.C.—*James v. U. S.*, 350 A.2d 748 (D.C. 1976).

N.C.—*State v. White*, 300 N.C. 494, 268 S.E.2d 481 (1980).

U.S.—*Tweety v. Mitchell*, 682 F.2d 461 (4th Cir. 1982).

Minn.—*State v. Niska*, 514 N.W.2d 260 (Minn. 1994).

N.C.—*State v. Hunter*, 34 N.C. App. 318, 238 S.E.2d 304 (1977).

Minn.—*State v. Niska*, 514 N.W.2d 260 (Minn. 1994).

Colo.—*Walker v. People*, 932 P.2d 303 (Colo. 1997).

Minn.—*State v. Auchampach*, 540 N.W.2d 808 (Minn. 1995).

Ala.—*Ex parte McGriff*, 908 So. 2d 1024 (Ala. 2004), decision clarified on denial of reh'g, (Jan. 14, 2005).

16C C.J.S. Constitutional Law § 1657

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

2. Presumptions, Inferences, and Burden of Proof

§ 1657. Burden of proof—Affirmative defenses

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4653, 4669, 4693, 4694

A legislature does not violate a defendant's due process rights when it allocates to the defendant the burden of proving an affirmative defense.

When a defense necessarily negates an element of a crime, it violates due process to place the burden of proof on the defendant.¹ The key to determining whether a defense necessarily negates an element is whether the completed crime and the defense can coexist.² However, due process permits states to place a burden on the defendant to prove an affirmative defense by a preponderance of the evidence so long as the defendant is not thereby required to negate an element of the offense.³ In short, a legislature does not violate a defendant's due process rights when it allocates to the defendant the burden of proving an affirmative defense.⁴ The State, moreover, is not constitutionally required to prove the nonexistence of affirmative defenses.⁵

Only a true affirmative defense, which consists of facts which exonerate the defendant⁶ or reduce the degree of the offense,⁷ and do not simply disprove an element of crime, may operate to allocate the burden of persuasion to the defendant without violating due process.⁸ In fact, if the government has proven all elements of the crime beyond a reasonable doubt, reallocating the burden

of proof in an affirmative defense does not violate due process.⁹ The states may not reallocate the burden of proof by labeling as an affirmative defense an element of a crime.¹⁰ For instance, a state may not, consistent with the due process guaranty, impose on the accused any burden of persuasion with respect to the defense of alibi, in view of the nature of the defense, which brings into question or seeks to negate an element of the crime charged.¹¹ Likewise, a statute criminalizing possession of pornographic work involving minors violates due process where it creates a de facto shift in the burden of persuasion to the defendant on the age of the persons depicted in the alleged child pornography because this is an essential element of the offense.¹² Relevant factors for a court to consider in determining whether an affirmative defense unconstitutionally shifts the burden of persuasion on an essential element of the charged crime to the defendant are whether the burden being placed on the defendant is one of production or persuasion, whether the State could constitutionally punish the defendant on the basis of proof of only those elements on which the prosecution retains the burden of proof, and other considerations such as the nature of the burden the State has historically had regarding the element in question and which party had ready access to the facts necessary to establish it.¹³

Due process is not violated by placing on the accused the burden of proving that he or she acted under the influence of extreme emotional distress in order to reduce a crime of murder to manslaughter¹⁴ or felony-murder,¹⁵ of proving his or her inability to pay child support,¹⁶ or of proving that a weapon used in a robbery was not loaded or inoperable in order to reduce the charge.¹⁷ Nor is due process violated by placing on a murder defendant the burden of proving self-defense¹⁸ where proof of the absence of grounds for self-defense is not an element of the offense charged.¹⁹

Placing upon the defendant the burden of proving the defense of entrapment does not deny due process.²⁰

Due process is generally held not to be denied by placing on the accused the burden of disproving sanity or of proving insanity.²¹

Where intent is an element of the crime, due process is not denied by placing on the accused the burden of presenting evidence of voluntary intoxication.²² The minority rule that a jury may not consider intoxication on the issue of a defendant's mental state does not violate due process in that it does not relieve the State of its burden of proving all the elements of the offense.²³ Due process is not violated by a statute which provides that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is the element of a criminal offense.²⁴

Placing upon the accused the burden of proving the defense of duress²⁵ or mistake of age²⁶ does not violate due process.

In some situations, a provision requiring the defendant to establish the affirmative defense of consent does not violate due process.²⁷ On the other hand, the placement of the burden of proving consent on a defendant will violate due process where the State has the burden of disproving consent and proving forcible compulsion beyond a reasonable doubt.²⁸

CUMULATIVE SUPPLEMENT

Cases:

While Due Process Clause requires prosecution to prove beyond reasonable doubt all elements included in definition of offense of which defendant is charged, proof of nonexistence of all affirmative defenses has never been constitutionally required. [U.S. Const. Amend. 5](#). [United States v. Ortiz](#), 927 F.3d 868 (5th Cir. 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 Wash.—*State v. W.R., Jr.*, 181 Wash. 2d 757, 336 P.3d 1134 (2014).
Interim consumption of alcohol
Affirmative defense provided for in statute making it offense for driver to have certain level of alcohol in his or her system while driving, that driver's blood alcohol concentration test results were affected by consumption of alcohol between time of driving and time of test, shifted burden of proof away from State effectively placed burden on defendant to prove his or her innocence, in violation of due process.
Del.—*State v. Baker*, 720 A.2d 1139 (Del. 1998).
Wash.—*State v. Crediford*, 130 Wash. 2d 747, 927 P.2d 1129 (1996).
- 2 Wash.—*State v. W.R., Jr.*, 181 Wash. 2d 757, 336 P.3d 1134 (2014).
- 3 Pa.—*Com. v. Mouzon*, 617 Pa. 527, 53 A.3d 738 (2012).
- 4 D.C.—*Hatch v. U.S.*, 35 A.3d 1115 (D.C. 2011).
Mass.—*Com. v. Gouse*, 461 Mass. 787, 965 N.E.2d 774 (2012).
Wash.—*State v. W.R., Jr.*, 181 Wash. 2d 757, 336 P.3d 1134 (2014).
- 5 Cal.—*People v. Neidinger*, 40 Cal. 4th 67, 51 Cal. Rptr. 3d 45, 146 P.3d 502 (2006).
Iowa—*State v. Boland*, 309 N.W.2d 438 (Iowa 1981).
Kan.—*State v. McCown*, 264 Kan. 655, 957 P.2d 401 (1998).
- 6 Mich.—*People v. Pegenau*, 447 Mich. 278, 523 N.W.2d 325 (1994).
- 7 U.S.—*U.S. ex rel. Garrett v. Acevedo*, 608 F. Supp. 2d 1005 (N.D. Ill. 2009).
- 8 Mich.—*People v. Pegenau*, 447 Mich. 278, 523 N.W.2d 325 (1994).
- 9 U.S.—*U.S. v. Matthews*, 545 F.3d 223 (2d Cir. 2008).
- 10 U.S.—*Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).
Iowa—*State v. Boland*, 309 N.W.2d 438 (Iowa 1981).
Witness tampering
Provision of witness tampering statute establishing "affirmative defense," under which defendant was required to prove by preponderance of evidence that he or she engaged solely in lawful conduct and that his or her sole intention was to encourage, induce, or cause other person to testify truthfully, violated due process by failing to create genuine affirmative defense and by impermissibly shifting burden of proof to defendant.
Fla.—*State v. Cohen*, 568 So. 2d 49 (Fla. 1990).
- 11 U.S.—*Stump v. Bennett*, 398 F.2d 111 (8th Cir. 1968).
N.Y.—*People v. Jones*, 74 A.D.2d 515, 425 N.Y.S.2d 5 (1st Dep't 1980).
As to notice of an alibi defense, see § 1695.
- 12 Minn.—*State v. Cannady*, 727 N.W.2d 403 (Minn. 2007).
- 13 Mich.—*People v. Pegenau*, 447 Mich. 278, 523 N.W.2d 325 (1994).
- 14 U.S.—*Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).
Del.—*State v. Moyer*, 387 A.2d 194 (Del. 1978).
- 15 U.S.—*Harris v. Fischer*, 438 Fed. Appx. 11 (2d Cir. 2011).
- 16 Or.—*State ex rel. Mikkelsen v. Hill*, 315 Or. 452, 847 P.2d 402 (1993).
- 17 U.S.—*Farrell v. Czarnetsky*, 417 F. Supp. 987 (S.D. N.Y. 1976), judgment aff'd, 566 F.2d 381 (2d Cir. 1977).
Conn.—*State v. Hawthorne*, 175 Conn. 569, 402 A.2d 759 (1978).
N.Y.—*People v. White*, 59 A.D.2d 347, 399 N.Y.S.2d 660 (1st Dep't 1977).
- 18 U.S.—*Martin v. Ohio*, 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987).
Ariz.—*State v. Casey*, 205 Ariz. 359, 71 P.3d 351 (2003).
Md.—*Outmezguine v. State*, 335 Md. 20, 641 A.2d 870, 42 A.L.R.5th 835 (1994).
Recklessness, extreme indifference, or criminal negligence
The State is not required under due process principles to do anything else to convict a defendant after making a prima facie case of a crime that requires recklessness, extreme indifference, or criminal negligence and

thus is not subject to an affirmative defense of self-defense although the defendant may introduce evidence of self-defense to raise a reasonable doubt about the State's proof of the requisite mental state.

Colo.—*People v. Pickering*, 276 P.3d 553 (Colo. 2011).

U.S.—*Williams v. Mohn*, 462 F. Supp. 756 (N.D. W. Va. 1978), *aff'd* in part and remanded, 605 F.2d 1208 (4th Cir. 1979).

Fla.—*Herrera v. State*, 594 So. 2d 275 (Fla. 1992).

N.Y.—*People v. Long*, 83 Misc. 2d 14, 372 N.Y.S.2d 389 (Sup 1975).

Wash.—*State v. Lively*, 130 Wash. 2d 1, 921 P.2d 1035 (1996).

As to entrapment or outrageous government conduct, generally, see § 1614.

U.S.—*Medina v. California*, 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992).

Md.—*Outmezguine v. State*, 335 Md. 20, 641 A.2d 870, 42 A.L.R.5th 835 (1994).

Wash.—*State v. Platt*, 143 Wash. 2d 242, 19 P.3d 412 (2001).

Battered women's syndrome

Ind.—*Marley v. State*, 747 N.E.2d 1123 (Ind. 2001).

As to the confinement, examination, and commitment of mentally disordered or addicted defendants, see §§ 1798 to 1811.

Minn.—*State v. Wahlberg*, 296 N.W.2d 408 (Minn. 1980).

Conscious disregard for life

A statute limiting the admissibility of evidence of voluntary intoxication only to the determination of whether the defendant acted with intent to kill did not violate a manslaughter defendant's due process right by preventing the defendant from presenting evidence on the issue of whether he harbored a conscious disregard for life, or by lessening the prosecution's burden of proof.

Cal.—*People v. Timms*, 151 Cal. App. 4th 1292, 60 Cal. Rptr. 3d 677 (1st Dist. 2007).

Mo.—*State v. Erwin*, 848 S.W.2d 476 (Mo. 1993), as modified on denial of reh'g, (Mar. 23, 1993).

Evidence not admissible

U.S.—*Montana v. Egelhoff*, 518 U.S. 37, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996).

U.S.—*U.S. v. Meraz-Solomon*, 3 F.3d 298 (9th Cir. 1993).

Tex.—*Alford v. State*, 806 S.W.2d 581 (Tex. App. Dallas 1991), petition for discretionary review granted, (July 3, 1991) and judgment *aff'd*, 866 S.W.2d 619 (Tex. Crim. App. 1993).

Alaska—*Steve v. State*, 875 P.2d 110 (Alaska Ct. App. 1994).

Md.—*Outmezguine v. State*, 335 Md. 20, 641 A.2d 870, 42 A.L.R.5th 835 (1994).

D.C.—*Russell v. U.S.*, 698 A.2d 1007 (D.C. 1997).

Wash.—*State v. W.R., Jr.*, 181 Wash. 2d 757, 336 P.3d 1134 (2014).

16C C.J.S. Constitutional Law § 1658

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

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§ 1658. Admissibility of evidence, generally

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West's Key Number Digest

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Reasonable rules governing the admissibility of evidence which do not deprive the accused of a reasonable opportunity to make his or her defense or to give in evidence all of the facts relating to the issue comport with due process requirements.

Reasonable rules governing the admissibility of evidence which do not deprive the accused of a reasonable opportunity to make his or her defense or to give in evidence all of the facts relating to the issue comport with due process requirements,¹ but an unreasonable or arbitrary rule of evidence,² or one that is disproportionate to the purpose it is designed to serve,³ denies due process.

Although a defendant has no per se right under the Due Process Clause to a pretrial hearing on the admissibility of pretrial identification evidence,⁴ where a pretrial hearing on the admissibility of evidence does take place, it implicates the defendant's due process liberty interest because the outcome of a criminal trial may depend on the admission or exclusion of certain evidence.⁵ At a suppression hearing, therefore, due process requires that a criminal defendant be afforded a fair hearing and a reliable determination on the issue of admissibility of the evidence and, at a minimum, the court must remain impartial and refrain from assessing the witness's credibility until after the witness has testified.⁶ In any case, a claim that the admission of a

pretrial forfeiture hearing statement violates a criminal defendant's privilege against self-incrimination is separate and distinct from claim that its introduction denies the defendant's general due process right to fair trial.⁷

Errors with respect to the admission of evidence generally do not amount to deprivation of due process.⁸ In fact, the introduction of improper evidence against a defendant does not amount to a violation of due process unless the evidence is so extremely unfair that its admission violates fundamental conceptions of justice.⁹ A party may consent to the admissibility of evidence which is otherwise inadmissible so long as the proceedings are not rendered so fundamentally unfair as to violate due process of law.¹⁰

Due process of law is not denied by the admission of evidence to which no timely objection is made,¹¹ and a defendant's testimony at a suppression hearing cannot be admitted at trial on the issue of guilt unless he or she makes no objection.¹²

Clearly exculpatory evidence.

The Due Process Clause guarantees a defendant the right to have clearly exculpatory evidence presented to the jury, at least when there is no strong countervailing systemic interest that justifies its exclusion.¹³

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Footnotes

- 1 Kan.—[State v. Williams](#), 224 Kan. 468, 580 P.2d 1341 (1978).
- 2 **Presentation of evidence**
Statute vesting trial court with discretion to exclude evidence if its probative value is outweighed by probability that its submission would create substantial danger of undue prejudice must bow to due process right of defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense.
Cal.—[People v. Reeder](#), 82 Cal. App. 3d 543, 147 Cal. Rptr. 275 (2d Dist. 1978).
U.S.—[Trillo v. Biter](#), 769 F.3d 995 (9th Cir. 2014).
Tenn.—[State v. Ackerman](#), 397 S.W.3d 617 (Tenn. Crim. App. 2012).
Tex.—[Kappel v. State](#), 402 S.W.3d 490 (Tex. App. Houston 14th Dist. 2013).
- 3 U.S.—[U.S. v. Daily](#), 488 F.3d 796 (8th Cir. 2007).
As to identification evidence, generally, see §§ 1673 to 1679.
- 5 N.H.—[State v. Haley](#), 141 N.H. 541, 689 A.2d 671 (1997).
- 6 Haw.—[State v. Pulse](#), 83 Haw. 229, 925 P.2d 797 (1996), as amended, (Sept. 23, 1996) and amended on reconsideration in part on other grounds, 83 Haw. 545, 928 P.2d 39 (1996).
- 7 U.S.—[Brown v. Berghuis](#), 638 F. Supp. 2d 795 (E.D. Mich. 2009).
- 8 U.S.—[Hackworth v. Beto](#), 434 F.2d 852 (5th Cir. 1970); [La Brasca v. Misterly](#), 423 F.2d 708 (9th Cir. 1970); [In re Wagner](#), 119 Cal. App. 3d 90, 173 Cal. Rptr. 766 (2d Dist. 1981).
Failure to lay proper foundation
Any error in State's failure to lay proper foundation for testimony of police technician that size of gunpowder marks on victim's clothing indicated how close pistol had been to victim when fired did not result in denial of due process.
U.S.—[Jones v. Wyrick](#), 542 F.2d 1013 (8th Cir. 1976).
- 9 U.S.—[Baker v. Kirkpatrick](#), 768 F. Supp. 2d 493 (W.D. N.Y. 2011).
- 10 Tenn.—[State v. Smith](#), 24 S.W.3d 274 (Tenn. 2000).
- 11 U.S.—[Wadley v. People of State of Cal.](#), 413 F.2d 296 (9th Cir. 1969).
Pa.—[Com. v. Bolden](#), 486 Pa. 383, 406 A.2d 333 (1979).
- 12 Cal.—[People v. Bryant](#), 60 Cal. 4th 335, 178 Cal. Rptr. 3d 185, 334 P.3d 573 (2014), petition for certiorari filed, 135 S. Ct. 1841 (2015).

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U.S.—[Ross v. District Attorney of the County of Allegheny](#), 672 F.3d 198 (3d Cir. 2012).

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16C C.J.S. Constitutional Law § 1659

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

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§ 1659. Relevance, competence, and materiality

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4522, 4650 to 4694

Due process requires that admission of evidence for or against the accused be according to the established rules as to competency and relevancy.

The trial court's exercise of its authority to admit or exclude evidence must be in accord with due process.¹ Due process requires that the admission of evidence for or against a defendant comport with the established rules as to competency² and relevancy.³

Generally, due process is not denied by the admission of evidence which is relevant, material, competent, and not privileged,⁴ but due process is violated by the admission of evidence which is irrelevant, immaterial, or incompetent⁵ or privileged.⁶ The Due Process Clause does not require the admission of irrelevant evidence or the admission of all relevant evidence.⁷

While the exclusion of evidence which is relevant, material, and competent,⁸ or which comes within the exceptions to the hearsay rule,⁹ denies due process of law, due process is not denied by the exclusion of irrelevant, immaterial, or incompetent evidence,¹⁰ or testimony of an incompetent witness.¹¹

To satisfy due process, it is essential that the accused be permitted to introduce all relevant and admissible evidence¹² of significant probative value to the defense.¹³ To deny a defendant a fair opportunity to present competent proof in his or her defense,¹⁴ including probative evidence tending to establish a third party's guilt¹⁵ or psychiatric testimony as to the mental condition of a defendant who has raised an insanity defense,¹⁶ denies the defendant due process, absent a valid justification for excluding the evidence.¹⁷ However, a rule allowing the admission of testimony of a professional psychologist or psychiatrist about a defendant's diminished capacity due to mental disease or defect for its bearing on an insanity defense, but precluding the use of such evidence to negate the mens rea element of a crime, does not violate due process.¹⁸ Indeed, the defendant's right to present evidence in his or her defense does not override established rules of evidence designed to assure both fairness and reliability¹⁹ in the ascertainment of guilt and innocence,²⁰ and does not permit him or her to introduce all favorable relevant evidence, no matter how limited its probative value.²¹ The exclusion of evidence on a minor, subsidiary,²² or immaterial²³ point does not impair a defendant's due process right to present a defense. Evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.²⁴ Instead, the proffered evidence must have more than "slight-relevancy" to the issues presented and be of some competent, substantial, and significant value,²⁵ and it must bear persuasive assurances of trustworthiness.²⁶

Whether a trial court's erroneous restriction of defense evidence in a criminal trial deprives the defendant of his or her due process right to present a defense must be resolved on a case by case basis.²⁷

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Footnotes

- 1 Ind.—[Lagenour v. State](#), 268 Ind. 441, 376 N.E.2d 475 (1978).
Discretion
 Exclusion of certain evidence properly exercised within the bounds of discretion does not violate defendant's right to due process.
 Haw.—[State v. Faulkner](#), 1 Haw. App. 651, 624 P.2d 940 (1981).
- 2 Ariz.—[State v. Lopez](#), 3 Ariz. App. 200, 412 P.2d 882 (1966).
 Or.—[State v. Bouse](#), 199 Or. 676, 264 P.2d 800 (1953) (overruled in part on other grounds by, [State v. Fischer](#), 232 Or. 558, 376 P.2d 418 (1962)) and (overruled in part on other grounds by, [State v. Brewton](#), 238 Or. 590, 395 P.2d 874 (1964)).
Absence of proper predicate
 Where a proper predicate had not been laid in second state trial for admission of testimony of absent witness who had testified at first trial, conviction violated Fourteenth Amendment.
 U.S.—[Holman v. Washington](#), 364 F.2d 618 (5th Cir. 1966).
- 3 U.S.—[U.S. v. Kasto](#), 584 F.2d 268, 3 Fed. R. Evid. Serv. 20 (8th Cir. 1978).
Evidence tending to prove charged offenses
 Evidence of frayed telephone cord and lamp oil tended to prove charged aggravated offenses of burglary, robbery, arson and murder, and, thus, admission of evidence in prosecution for capital murder, where victim had been set on fire, was not plain error and did not deprive defendant of due process.
 Ohio—[State v. Lott](#), 51 Ohio St. 3d 160, 555 N.E.2d 293 (1990).
- 4 U.S.—[Moore v. Illinois](#), 408 U.S. 786, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972).
 Cal.—[People v. Jones](#), 57 Cal. 4th 899, 161 Cal. Rptr. 3d 295, 306 P.3d 1136 (2013), as modified on denial of reh'g, (Oct. 2, 2013) and cert. denied, 134 S. Ct. 1944, 188 L. Ed. 2d 967 (2014).
 Ky.—[Wiley v. Com.](#), 575 S.W.2d 166 (Ky. Ct. App. 1978).
- 5 U.S.—[Scalf v. Bennett](#), 408 F.2d 325 (8th Cir. 1969).
Limited probative value; highly prejudicial
 U.S.—[U. S. ex rel. Springle v. Follette](#), 435 F.2d 1380 (2d Cir. 1970).

- 6 U.S.—*Duvarado v. Giurbino*, 649 F. Supp. 2d 980 (N.D. Cal. 2009), *aff'd*, 410 Fed. Appx. 69 (9th Cir. 2011).
 Ill.—*People v. Knippenberg*, 66 Ill. 2d 276, 6 Ill. Dec. 46, 362 N.E.2d 681 (1977).
 7 Mo.—*State v. Miller*, 220 S.W.3d 862 (Mo. Ct. App. W.D. 2007).
 8 Ga.—*Dean v. State*, 267 Ga. 306, 477 S.E.2d 573 (1996).
 La.—*State v. Washington*, 386 So. 2d 1368 (La. 1980).
 Tex.—*Wiley v. State*, 74 S.W.3d 399 (Tex. Crim. App. 2002).
 9 Conn.—*State v. Gold*, 180 Conn. 619, 431 A.2d 501 (1980).
 10 U.S.—*Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942).
 N.C.—*State v. Larrimore*, 340 N.C. 119, 456 S.E.2d 789 (1995).
 Wis.—*State v. Cramer*, 91 Wis. 2d 553, 283 N.W.2d 625 (Ct. App. 1979), *decision aff'd*, 98 Wis. 2d 416, 296 N.W.2d 921 (1980).

Relevant evidence

Defendant does not have right to offer evidence that is incompetent, privileged, or otherwise inadmissible under the standard rules of evidence even if it is relevant.

- U.S.—*Montana v. Egelhoff*, 518 U.S. 37, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996).
 11 La.—*State v. La Rocca*, 168 La. 204, 121 So. 744 (1929).
 12 U.S.—*U.S. v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974); *Hughes v. Mathews*, 576 F.2d 1250 (7th Cir. 1978).
 Nev.—*Vipperman v. State*, 96 Nev. 592, 614 P.2d 532 (1980).
 13 Cal.—*People v. Tidwell*, 163 Cal. App. 4th 1447, 78 Cal. Rptr. 3d 474 (3d Dist. 2008).
 14 U.S.—*Gomez v. Adams*, 555 F. Supp. 2d 1070 (C.D. Cal. 2008).
 Nev.—*Pineda v. State*, 120 Nev. 204, 88 P.3d 827 (2004).
 Tex.—*Ruffin v. State*, 270 S.W.3d 586 (Tex. Crim. App. 2008).

Handwriting sample

- W. Va.—*State v. Jenkins*, 195 W. Va. 620, 466 S.E.2d 471 (1995).
 As to the accused's due process right to be heard, see § 1610.
 15 Ala.—*Ex parte Griffin*, 790 So. 2d 351 (Ala. 2000).
 Ky.—*Harris v. Com.*, 134 S.W.3d 603 (Ky. 2004).
 N.J.—*State v. Timmenedequas*, 161 N.J. 515, 737 A.2d 55 (1999).

Even though testimony insufficient to overcome presumption of sanity

- Nev.—*Williams v. State*, 110 Nev. 1182, 885 P.2d 536 (1994).
 17 Cal.—*People v. London*, 228 Cal. App. 4th 544, 175 Cal. Rptr. 3d 392 (4th Dist. 2014).
 18 U.S.—*Clark v. Arizona*, 548 U.S. 735, 126 S. Ct. 2709, 165 L. Ed. 2d 842 (2006).
 19 U.S.—*Bong v. Thurmer*, 649 F. Supp. 2d 922 (W.D. Wis. 2009).
 20 Iowa.—*State v. Conner*, 241 N.W.2d 447 (Iowa 1976).
 21 Cal.—*People v. Reeder*, 82 Cal. App. 3d 543, 147 Cal. Rptr. 275 (2d Dist. 1978).
 22 Cal.—*People v. Boyette*, 29 Cal. 4th 381, 127 Cal. Rptr. 2d 544, 58 P.3d 391 (2002), *as modified*, (Feb. 11, 2003).
 23 Conn.—*State v. Kelly*, 256 Conn. 23, 770 A.2d 908 (2001).

Evidence of race

Improper injection of race as issue into criminal proceeding violates defendant's constitutional right of due process.

- Del.—*Floudiotis v. State*, 726 A.2d 1196 (Del. 1999).

Character evidence

Decision to exclude evidence of codefendant's character for violence did not violate defendant's due process right to present defense by demonstrating that codefendant was triggerman; trial court's evidentiary ruling did not preclude defendant from attempting to prove that codefendant was triggerman but merely prevented him from proving it with time-consuming hearsay and character evidence that was not particularly probative on issue.

- Cal.—*People v. Jones*, 17 Cal. 4th 279, 70 Cal. Rptr. 2d 793, 949 P.2d 890 (1998).
 24 Nev.—*Rose v. State*, 123 Nev. 194, 163 P.3d 408 (2007).
 25 Cal.—*People v. Tidwell*, 163 Cal. App. 4th 1447, 78 Cal. Rptr. 3d 474 (3d Dist. 2008).
 26 *Trillo v. Biter*, 769 F.3d 995 (9th Cir. 2014).

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Conn.—[State v. Esposito](#), 235 Conn. 802, 670 A.2d 301 (1996).

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16C C.J.S. Constitutional Law § 1660

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

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§ 1660. Hearsay

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West's Key Number Digest

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The admissibility of hearsay statements generally depends on due process considerations of fairness, reliability, and trustworthiness.

Although the hearsay evidence rule, with all its subtleties, anomalies, and ramifications is not read into the Fourteenth Amendment,¹ the question of the admission of hearsay statements turns on due process considerations of fairness, reliability, and trustworthiness.² Since a defendant has a due process right to present exculpatory evidence,³ the exclusion of hearsay statements against the declarant's penal interest⁴ or that do not fit within any traditional exception, but would exonerate the defendant if true,⁵ and bear persuasive assurance of trustworthiness,⁶ may constitute a denial of due process under exceptional circumstances. Under due process requirements, a hearsay rule may not be applied mechanistically to exclude evidence of an alternative perpetrator.⁷

The right to due process does not include the right to admit untrustworthy declarations.⁸ Circumstances providing assurance of a statement's reliability may include indications that the statement was spontaneously made to a close acquaintance shortly

after the crime occurred,⁹ that the statement is corroborated by other evidence in the case,¹⁰ and that there was an adequate opportunity for cross-examination of the declarant.¹¹

Unless a defendant shows that he or she has been prevented from putting on a viable defense¹² or that he or she has been deprived of a fair trial,¹³ evidentiary rulings preventing him or her from introducing hearsay evidence do not violate his or her right to due process. If the declarant is available to testify but the defendant chooses not to exercise his or her right of compulsory process to require the declarant to testify on his or her behalf, exclusion of the statement does not deny the defendant due process.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

Admission of statements made by victim of assault and battery to his mother during two telephone calls, including in the first call that his girlfriend, defendant, had punched him in the eyes and stolen his car, and then in a second call, that the defendant had returned and threatened to kill him with a knife, did not violate defendant's due process right to a fair trial; the statements qualified as spontaneous utterances, and thus, their admission complied with evidentiary standards. *U.S. Const. Amend. 14*; *Mass. Guide to Evid. § 803(2)*. *Commonwealth v. McGann*, 484 Mass. 312, 141 N.E.3d 405 (2020).

Murder defendant's statement to police officer, that victim came at him with a sword, was not admissible under statement against interest hearsay exception; defendant was not unavailable, as required for exception, since he chose to exercise his Fifth Amendment privilege against compulsory self-incrimination and, thus remained free to change his mind and testify, and, even if he were unavailable, statement was not so far contrary to defendant's penal interest, as it was made to officer when he was covered in victim's blood and had victim's possessions on his person, and statement could have been motivated by a desire to curry favor with officer and explain his actions. *U.S.C.A. Const. Amend. 5*; *NMRA, Rule 11–804(A)(1), (B)(3)*. *State v. King*, 2015-NMSC-030, 357 P.3d 949 (N.M. 2015).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Stein v. People of State of New York*, 346 U.S. 156, 73 S. Ct. 1077, 97 L. Ed. 1522 (1953) (overruled in part on other grounds by, *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A.L.R.3d 1205 (1964)).
- 2 U.S.—*U.S. v. Medico*, 557 F.2d 309, 2 Fed. R. Evid. Serv. 33 (2d Cir. 1977) (rejected on other grounds by, *State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75 (1995)); *U.S. v. Hughes*, 529 F.2d 838 (5th Cir. 1976).
Commission of crime by third parties
In armed robbery prosecution, trial judge did not violate due process rights of defendant by excluding hearsay testimony of defense witness to effect that other people had admitted to him that they had committed robbery since testimony did not bear sufficient indicia of reliability and trustworthiness to allow its admission.
Wis.—*State v. Brown*, 85 Wis. 2d 341, 270 N.W.2d 87 (Ct. App. 1978), opinion aff'd, 96 Wis. 2d 238, 291 N.W.2d 528 (1980).
§ 1648.
- 3
- 4 Ill.—*People v. Caffey*, 205 Ill. 2d 52, 275 Ill. Dec. 390, 792 N.E.2d 1163 (2001).
Mo.—*State v. Davidson*, 982 S.W.2d 238 (Mo. 1998).
Or.—*State v. Cazares-Mendez*, 233 Or. App. 310, 227 P.3d 172 (2010), decision aff'd, 350 Or. 491, 256 P.3d 104 (2011).
No clear indication of trustworthiness

Due process did not require admission in criminal prosecution of notes written by unavailable declarant who was implicated as coparticipant, purporting to admit sole responsibility for charged crime, under statement against interest exception, since corroborating circumstances did not clearly indicate trustworthiness and reliability of statements.

Ohio—*State v. Sumlin*, 69 Ohio St. 3d 105, 1994-Ohio-508, 630 N.E.2d 681 (1994).

Mo.—*State v. Davidson*, 982 S.W.2d 238 (Mo. 1998).

Defendant not exonerated; no violation of due process

(1) Excluding victim's hearsay statements about threats by employees or representatives of her client's opponent in litigation did not violate due process in capital murder prosecution; no other evidence connected opponent to murder, no evidence indicated who made threats, and statements were not reliable to establish that someone other than defendant committed murder.

Fla.—*Grim v. State*, 841 So. 2d 455 (Fla. 2003).

(2) Excluding murder-for-hire mastermind's statements to cellmate that two members of his drug ring and another person had killed informant and cleaned blood off themselves in mastermind's house did not violate due process in prosecution of hit-man for capital murder; statements did not amount to a confession and did not exonerate the hit-man, and mastermind was not available for cross-examination.

Ohio—*State v. Yarbrough*, 95 Ohio St. 3d 227, 2002-Ohio-2126, 767 N.E.2d 216 (2002).

Cal.—*People v. Lightsey*, 54 Cal. 4th 668, 143 Cal. Rptr. 3d 589, 279 P.3d 1072 (2012).

Ga.—*Coleman v. State*, 286 Ga. 291, 687 S.E.2d 427 (2009).

Ill.—*People v. Luna*, 2013 IL App (1st) 72253, 371 Ill. Dec. 65, 989 N.E.2d 655 (App. Ct. 1st Dist. 2013), appeal denied, 374 Ill. Dec. 573, 996 N.E.2d 20 (Ill. 2013).

Prior testimony; witness no longer available

N.Y.—*People v. Robinson*, 89 N.Y.2d 648, 657 N.Y.S.2d 575, 679 N.E.2d 1055 (1997).

Minn.—*State v. Burrell*, 697 N.W.2d 579 (Minn. 2005).

N.J.—*State v. Nevius*, 426 N.J. Super. 379, 45 A.3d 360 (App. Div. 2012), officially published in part, 2012 WL 2361516 (N.J. Super. Ct. App. Div. 2012) and certification denied, 213 N.J. 568, 65 A.3d 835 (2013).

N.C.—*State v. Brown*, 335 N.C. 477, 439 S.E.2d 589 (1994).

Ill.—*People v. Tenney*, 205 Ill. 2d 411, 275 Ill. Dec. 800, 793 N.E.2d 571 (2002).

Mo.—*State v. Hutchison*, 957 S.W.2d 757 (Mo. 1997).

Not spontaneously made

Mo.—*State v. Taylor*, 298 S.W.3d 482 (Mo. 2009).

Ill.—*People v. Tenney*, 205 Ill. 2d 411, 275 Ill. Dec. 800, 793 N.E.2d 571 (2002).

Mass.—*Com. v. Szerlong*, 457 Mass. 858, 933 N.E.2d 633 (2010).

Ohio—*State v. Yarbrough*, 95 Ohio St. 3d 227, 2002-Ohio-2126, 767 N.E.2d 216 (2002).

Ill.—*People v. Tenney*, 205 Ill. 2d 411, 275 Ill. Dec. 800, 793 N.E.2d 571 (2002).

Ky.—*Mills v. Com.*, 996 S.W.2d 473 (Ky. 1999) (overruled on other grounds by, *Padgett v. Com.*, 312 S.W.3d 336 (Ky. 2010)).

U.S.—*Apanovitch v. Houk*, 466 F.3d 460, 71 Fed. R. Evid. Serv. 650, 2006 FED App. 0384P (6th Cir. 2006).

Ill.—*People v. Luna*, 2013 IL App (1st) 72253, 371 Ill. Dec. 65, 989 N.E.2d 655 (App. Ct. 1st Dist. 2013), appeal denied, 374 Ill. Dec. 573, 996 N.E.2d 20 (Ill. 2013).

Ind.—*Jones v. State*, 655 N.E.2d 49 (Ind. 1995).

Ky.—*Justice v. Com.*, 987 S.W.2d 306 (Ky. 1998).

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

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§ 1661. Test results

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4522, 4650 to 4694

The admission into evidence of results from blood-alcohol and polygraph tests does not violate a defendant's due process rights.

A part of the due process guarantee of the United States Constitution is that an individual not suffer punitive action as a result of an inaccurate scientific procedure.¹ Although scientific test results need not be infallible to meet this standard, the evidence must not be so extremely unfair that its admission violates fundamental conceptions of justice.²

The use of breathalyzer test results as evidence in a prosecution for driving while intoxicated does not violate the accused's due process rights,³ including the right to cross-examine adverse witnesses.⁴

Although admission into evidence of the results of a polygraph examination does not necessarily deny due process,⁵ neither does a decision by a state court to refuse to admit any evidence concerning polygraph examinations violate the defendant's right to due process.⁶

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Footnotes

- 1 [Kulbicki v. State](#), 207 Md. App. 412, 53 A.3d 361 (2012), cert. granted, 430 Md. 344, 61 A.3d 18 (2013).
- 2 [Kulbicki v. State](#), 207 Md. App. 412, 53 A.3d 361 (2012), cert. granted, 430 Md. 344, 61 A.3d 18 (2013).
- 3 N.M.—[State v. Myers](#), 88 N.M. 16, 1975-NMCA-055, 536 P.2d 280 (Ct. App. 1975).
Ohio—[State v. Zanni](#), 2014-Ohio-2806, 15 N.E.3d 370 (Ohio Ct. App. 4th Dist. Ross County 2014), appeal not allowed, 141 Ohio St. 3d 1421, 2014-Ohio-5567, 21 N.E.3d 1114 (2014).
Or.—[State v. West](#), 250 Or. App. 196, 279 P.3d 354 (2012).
As to tests for intoxication in connection with contentions relating to compulsory testimony and self-incrimination, see § 1668.
- 4 Alaska—[Cooley v. Municipality of Anchorage](#), 649 P.2d 251 (Alaska Ct. App. 1982).
- 5 N.M.—[State v. Dorsey](#), 87 N.M. 323, 1975-NMCA-022, 532 P.2d 912 (Ct. App. 1975), decision aff'd, 1975-NMSC-040, 88 N.M. 184, 539 P.2d 204 (1975).
Tex.—[Patteson v. State](#), 633 S.W.2d 549 (Tex. App. Houston 14th Dist. 1982).
- 6 U.S.—[Hall v. Scribner](#), 619 F. Supp. 2d 823 (N.D. Cal. 2008).
Cal.—[People v. Lucas](#), 60 Cal. 4th 153, 177 Cal. Rptr. 3d 378, 333 P.3d 587 (2014).
R.I.—[State v. Werner](#), 851 A.2d 1093 (R.I. 2004).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

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§ 1662. Evidence of other offenses or bad acts

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4669

Generally, due process is not violated by permitting the State to introduce the prior convictions of the accused to impeach his or her credibility at trial.

Since it affects the presumption of innocence, reference to criminal history, absent special conditions of admissibility, is a violation of due process¹ unless a reviewing court determines that the reference was harmless beyond a reasonable doubt.² However, although evidence of a defendant's prior convictions is inherently prejudicial,³ due process of law does not preclude all references to prior offenses at criminal trials⁴ and is not violated by proof of the defendant's prior convictions in the presence of the jury.⁵ Whether the use of evidence of prior offenses or convictions constitutes a denial of due process depends upon all the relevant circumstances⁶ or the totality of the circumstances,⁷ and a due process challenge to a statute allowing the introduction of evidence of prior offenses requires a showing that statute offends some principle of justice so rooted in traditions and conscience as to be ranked as fundamental.⁸

Although there is some authority to the contrary,⁹ due process is not denied by the introduction of evidence of the defendant's prior convictions to impeach his or her credibility.¹⁰ However, the use for impeachment purposes of prior convictions which are void for failure to afford the accused his or her right to counsel violates due process of law.¹¹

The introduction of the defendant's prior convictions for valid purposes does not violate due process where the jury is instructed to limit its consideration of the evidence to its proper function.¹² It is a violation of due process if evidence of other crimes is admitted without a limiting instruction.¹³

Although it has been held that, in exercising its discretionary powers to control the cross-examination of the accused as to prior convictions, the trial court should bear in mind that the use of prior convictions to show nothing more than a disposition to commit a crime, or the crime currently charged, would violate due process,¹⁴ the introduction of evidence of prior offenses to show propensity has been approved in some jurisdictions,¹⁵ but not in others,¹⁶ and in some instances, a careful weighing of the prejudice against the probative value of the evidence is essential to protect a defendant's due process right to a fundamentally fair trial.¹⁷

Due process is not denied by the admission of evidence of the accused's prior convictions or offenses to show his or her motive, intent, or knowledge,¹⁸ or the accused's identity,¹⁹ or to show a common mode of operation.²⁰ The defendant's prior convictions or offenses may also be admitted, without violating the due process guaranty, to increase the degree of the offense charged from a misdemeanor to a felony,²¹ to prove that the defendant is a habitual criminal²² or a repeat offender,²³ or to aid the judge or jury in assessing the penalty.²⁴

Where the jury learns of prior crimes committed by the accused, but the conceded possibility of prejudice is believed to be outweighed by the validity of the State's purpose in permitting introduction of the evidence, the Due Process Clause is not violated.²⁵ Thus, testimony by witnesses relating to the defendant's prior criminal activities,²⁶ or relating to the defendant's contemporaneous criminal activity during the commission of the crime charged,²⁷ may not be so prejudicial as to render the proceedings fundamentally unfair and a denial of due process.

Mug shots.

The test for determining whether an accused's constitutional rights have been violated by the introduction of mug shots in evidence is whether, viewing the facts of the case in their totality, the resulting prejudice created by the admission of the mug shots greatly outweighs their probative value.²⁸

Association with group.

Evidence of the defendant's association with a specific group will not violate his or her due process rights²⁹ where the evidence is relevant to character issues, to establish a plan for the crime, or for some other proper purpose.³⁰ Where such evidence has no legitimate purpose, however, it will violate due process.³¹

Correctional facility listed as defendant's residence.

The use of a document which lists a correctional facility as the defendant's residence, to infer that the defendant has a prior felony conviction, may not present a due process issue where the document is only offered to show the defendant's relationship to one of the conspirators, and the jury is not exposed to any information beyond that received in evidence at trial.³²

CUMULATIVE SUPPLEMENT

Cases:

District Court's error in admitting evidence from one of defendant's former supervisors regarding prior incident, in which defendant disobeyed an order involving the transportation of fiberglass hut to Alaskan island, that was neither inextricably intertwined nor permissible motive evidence so infected defendant's trial for first degree murder, murder of a federal employee, and use of a firearm in relation to a crime of violence resulting in death with unfairness as to make resulting conviction denial of due process, thereby requiring reversal of conviction and remand to District Court for new trial. [U.S. Const. Amend. 4](#); [18 U.S.C.A. §§ 924\(c\), 924\(j\), 1111\(a\), 1111\(b\), 1114](#); [Fed. R. Evid. 404\(b\)\(1\)](#). [United States v. Wells, 879 F.3d 900 \(9th Cir. 2018\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 Nev.—[Rice v. State, 108 Nev. 43, 824 P.2d 281 \(1992\)](#).
As to the presumption of innocence, see § 1652.
- 2 Nev.—[Sherman v. State, 114 Nev. 998, 965 P.2d 903 \(1998\)](#).
- 3 N.H.—[State v. Skidmore, 138 N.H. 201, 636 A.2d 64 \(1993\)](#) (overruled on other grounds by, [State v. Hebert, 158 N.H. 306, 965 A.2d 1059 \(2009\)](#)).
- 4 U.S.—[Bond v. State of Okl., 546 F.2d 1369 \(10th Cir. 1976\)](#).
Cal.—[People v. Prince, 268 Cal. App. 2d 398, 74 Cal. Rptr. 197 \(1st Dist. 1968\)](#).
Where defense counsel has opened door
Mich.—[People v. Bradford, 10 Mich. App. 696, 160 N.W.2d 373 \(1968\)](#).
- 5 U.S.—[Spencer v. State of Tex., 385 U.S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606 \(1967\)](#); [Hernandez v. Beto, 443 F.2d 634 \(5th Cir. 1971\)](#).
- 6 U.S.—[U. S. ex rel. Bibbs v. Twomey, 538 F.2d 151 \(7th Cir. 1976\)](#).
Mass.—[Com. v. Cain, 383 Mass. 874, 419 N.E.2d 835 \(1981\)](#).
- 7 La.—[State v. Segura, 127 So. 3d 1034 \(La. Ct. App. 3d Cir. 2013\)](#).
- 8 Cal.—[People v. Falsetta, 21 Cal. 4th 903, 89 Cal. Rptr. 2d 847, 986 P.2d 182 \(1999\)](#).
- 9 Haw.—[State v. Santiago, 53 Haw. 254, 492 P.2d 657 \(1971\)](#) (rejected by, [Lowell v. State, 574 P.2d 1281 \(Alaska 1978\)](#)).
- 10 U.S.—[U.S. v. Julian, 427 F.3d 471, 68 Fed. R. Evid. Serv. 765 \(7th Cir. 2005\)](#); [Caldwell v. Thaler, 770 F. Supp. 2d 849 \(S.D. Tex. 2011\)](#) (applying Tex. law).
Cal.—[People v. Robinson, 199 Cal. App. 4th 707, 131 Cal. Rptr. 3d 177 \(2d Dist. 2011\)](#).
- 11 U.S.—[Loper v. Beto, 405 U.S. 473, 92 S. Ct. 1014, 31 L. Ed. 2d 374 \(1972\)](#).
Ga.—[Turner v. Hopper, 231 Ga. 672, 203 S.E.2d 481 \(1974\)](#).
N.C.—[State v. Atkinson, 39 N.C. App. 575, 251 S.E.2d 677 \(1979\)](#).
- 12 U.S.—[Dowling v. U.S., 493 U.S. 342, 110 S. Ct. 668, 107 L. Ed. 2d 708, 29 Fed. R. Evid. Serv. 1 \(1990\)](#); [Bey v. Bagley, 500 F.3d 514 \(6th Cir. 2007\)](#).
N.C.—[State v. Ross, 295 N.C. 488, 246 S.E.2d 780 \(1978\)](#).
- 13 U.S.—[Murray v. Superintendent, Kentucky State Penitentiary, 651 F.2d 451 \(6th Cir. 1981\)](#).
- 14 N.H.—[State v. Cote, 108 N.H. 290, 235 A.2d 111 \(1967\)](#).
- 15 U.S.—[Rodriguez v. Jones, 625 F. Supp. 2d 552 \(E.D. Mich. 2009\)](#).
Cal.—[People v. Flores, 176 Cal. App. 4th 1171, 98 Cal. Rptr. 3d 450 \(2d Dist. 2009\)](#).
Prior sex offenses
Statute that permits evidence of prior sex offenses to be used to show propensity to commit charged sex crime does not violate due process; such evidence is at least circumstantially relevant, and statute affords

substantial protections to defendants by limiting propensity evidence to other sex offenses, requiring pretrial notice of the offenses sought to be proved, and reaffirming duty of trial court to exclude the evidence if its admission may necessitate undue consumption of time or if danger of undue prejudice outweighs probative value.

Cal.—*People v. Falsetta*, 21 Cal. 4th 903, 89 Cal. Rptr. 2d 847, 986 P.2d 182 (1999).

16 U.S.—*Barcikowski v. Sun Microsystems, Inc.*, 420 F. Supp. 2d 1163 (D. Colo. 2006) (evidence of prior or other "bad acts" is never admissible simply to establish propensity to engage in similar acts).

17 Cal.—*People v. Dejourney*, 192 Cal. App. 4th 1091, 121 Cal. Rptr. 3d 787 (4th Dist. 2011).

18 U.S.—*Morales v. Jones*, 357 Fed. Appx. 184 (10th Cir. 2009) (motive, intent, and knowledge); *Castillo v. Clark*, 610 F. Supp. 2d 1084 (C.D. Cal. 2009) (motive and intent).

Or.—*State v. Olson*, 263 Or. App. 246, 328 P.3d 704 (2014), review denied, 356 Or. 400, 339 P.3d 440 (2014) (intent).

Plan, preparation, and opportunity

Ohio—*State v. Davis*, 62 Ohio St. 3d 326, 581 N.E.2d 1362 (1991).

19 U.S.—*Bey v. Bagley*, 500 F.3d 514 (6th Cir. 2007).

Ohio—*State v. Davis*, 62 Ohio St. 3d 326, 581 N.E.2d 1362 (1991).

Tex.—*Richardson v. State*, 432 S.W.2d 100 (Tex. Crim. App. 1968).

Rape of witness

Admission into evidence in homicide prosecution, of testimony by State's witness that she had been raped by defendant prior to killings, which evidence was relevant to establish identity of murderer, did not deny defendant due process merely because it was evidence of an offense which was subject of separate, pending prosecution.

Ind.—*Bruce v. State*, 268 Ind. 180, 375 N.E.2d 1042, 1 A.L.R.4th 616 (1978).

20 U.S.—*Malone v. Crouse*, 380 F.2d 741 (10th Cir. 1967).

21 U.S.—*U. S. ex rel. Smith v. Fay*, 409 F.2d 564 (2d Cir. 1969).

22 U.S.—*Wooliver v. Henderson*, 391 F.2d 712 (6th Cir. 1968).

Ky.—*Wilson v. Com.*, 476 S.W.2d 622 (Ky. 1971) (rejected on other grounds by, *Callihan v. Com.*, 142 S.W.3d 123 (Ky. 2004)).

23 Va.—*Medici v. Com.*, 260 Va. 223, 532 S.E.2d 28 (2000) (rejected on other grounds by, *Townsend v. Com.*, 270 Va. 325, 619 S.E.2d 71 (2005)).

24 Ill.—*People v. Kelley*, 44 Ill. 2d 315, 255 N.E.2d 390 (1970).

Pa.—*Com. v. Leamer*, 449 Pa. 76, 295 A.2d 272 (1972).

Tex.—*Thomas v. State*, 482 S.W.2d 218 (Tex. Crim. App. 1972).

25 U.S.—*Rogers v. Giurbino*, 619 F. Supp. 2d 1006 (S.D. Cal. 2007); *U. S. ex rel. Hunter v. Follette*, 307 F. Supp. 1023 (S.D. N.Y. 1969), judgment aff'd, 420 F.2d 779 (2d Cir. 1969).

Cal.—*People v. Dejourney*, 192 Cal. App. 4th 1091, 121 Cal. Rptr. 3d 787 (4th Dist. 2011).

26 U.S.—*Batten v. Scurr*, 649 F.2d 564 (8th Cir. 1981); *U.S. v. Hawkins*, 681 F.2d 1343, 11 Fed. R. Evid. Serv. 407 (11th Cir. 1982).

Ky.—*Brainard v. Com.*, 551 S.W.2d 829 (Ky. Ct. App. 1977).

Defendant acquitted

Introduction of testimony of victim of house burglary, that defendant was involved in that burglary, did not violate due process test of fundamental fairness, even though defendant was acquitted of charges arising out of house burglary, particularly as trial judge gave limiting instructions and twice told jury of defendant's prior acquittal.

U.S.—*Dowling v. U.S.*, 493 U.S. 342, 110 S. Ct. 668, 107 L. Ed. 2d 708, 29 Fed. R. Evid. Serv. 1 (1990).

27 U.S.—*Reese v. Wainwright*, 600 F.2d 1085 (5th Cir. 1979).

D.C.—*Williams v. U. S.*, 379 A.2d 698 (D.C. 1977).

28 U.S.—*U. S. ex rel. Johnson v. Hatrak*, 417 F. Supp. 316 (D.N.J. 1976), aff'd, 564 F.2d 90 (3d Cir. 1977) and aff'd, 564 F.2d 90 (3d Cir. 1977); *Hill v. Moore*, 510 F. Supp. 846 (W.D. Tenn. 1981), aff'd, 672 F.2d 917 (6th Cir. 1981).

Deprivation of fundamentally fair trial

The admission over the objection of the defendant of an arrest photograph depicting him in a prison-issue orange jumpsuit, beside a yardstick measuring his height, offered to rebut a witness' testimony that the defendant did not have facial hair during the entire time the witness knew him, deprived the defendant of

a fundamentally fair trial, in violation of due process; the evidence was not impeaching, as the photograph was taken prior to the period during which the witness claimed he had known the defendant, and at least two jurors interpreted the "mug shots" as indicting the probability of the defendant having a prior criminal record, and expressed those sentiments to the entire jury during deliberations.

U.S.—[Nelson v. Brown](#), 673 F. Supp. 2d 85 (E.D. N.Y. 2009).

Identification of accused

Where state penitentiary "mugshot" which had material identifying it as penitentiary mugshot covered with adhesive tape was introduced because trial judge found it relevant to identification testimony of victims, admission was not so clearly prejudicial as to deny petitioner due process of law even though no cautionary instructions were given.

U.S.—[Parker v. Swenson](#), 332 F. Supp. 1225 (E.D. Mo. 1971), judgment aff'd, 459 F.2d 164 (8th Cir. 1972).

Gang association

U.S.—[Young v. Attorney General for New Mexico](#), 534 Fed. Appx. 707 (10th Cir. 2013).

Kan.—[State v. Roberts](#), 261 Kan. 320, 931 P.2d 683 (1997).

Membership in white supremacist group

Okla.—[Wood v. State](#), 1998 OK CR 19, 959 P.2d 1 (Okla. Crim. App. 1998).

Okla.—[Wood v. State](#), 1998 OK CR 19, 959 P.2d 1 (Okla. Crim. App. 1998).

Cal.—[People v. Albarran](#), 149 Cal. App. 4th 214, 57 Cal. Rptr. 3d 92 (2d Dist. 2007).

U.S.—[U.S. v. Snype](#), 441 F.3d 119, 69 Fed. R. Evid. Serv. 817 (2d Cir. 2006) (marriage certificate).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

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§ 1663. Improperly obtained evidence

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West's Key Number Digest, [Constitutional Law](#)  4655

The admission of evidence obtained as a result of unlawful search and seizure violates due process.

The Fourth Amendment, precluding the admissibility of illegally seized evidence in criminal prosecutions, is applicable to the states through the Due Process Clause of the Fourteenth Amendment.¹ The admission of such evidence is a violation of due process,² and it is on that basis, and not as a consequence of a rule of evidence, that evidence obtained in violation of the Fourth Amendment is not admissible.³

The limitations of due process are applicable only when the government activity in question violates some protected right of the accused.⁴ Admission of evidence seized pursuant to a lawful search warrant does not violate the accused's right to due process of law.⁵ Evidence obtained by police officers outside of their territorial jurisdiction while conducting an undercover investigation is not subject to suppression on due process grounds.⁶

Where there is a dispute as to whether property seized from the accused is the fruit of illegal activity, due process may require that the court hold a hearing in which the accused is allowed to cross-examine witnesses and to present evidence.⁷

A conviction founded upon testimony coerced by the State violates due process⁸ when violence, torture, or some other form of inhumane coercion permeates the process by which testimony is obtained.⁹ In other words, convictions based on evidence obtained by methods that are so brutal and offensive to human dignity that they shock the conscience violate due process.¹⁰ Furthermore, the coerced testimony of a witness other than the accused may be excluded in order to protect the defendant's own federal due process right to a fair trial, and in particular, to ensure the reliability of the testimony offered against him or her, but the defendant must demonstrate how such misconduct, if any, has directly impaired the free and voluntary nature of the anticipated testimony in the trial itself.¹¹ In any event, permitting a witness to plead to a lesser charge or granting him or her immunity in exchange for testimony incriminating the accused does not constitute coercion so as to violate the accused's due process rights.¹² Where a witness testifies as to a fact earlier obtained by coercive police action and all of the circumstances surrounding the alleged coercive acts are before the jury, the requirements of due process are met.¹³

The fact that a government informer engaged in an unlawful conduct in obtaining evidence against the accused does not necessarily preclude the prosecution of the accused on due process grounds¹⁴ or render inadmissible evidence obtained through the informer.¹⁵

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Footnotes

- 1 Me.—*State v. Jolin*, 639 A.2d 1062 (Me. 1994).
N.J.—*State in Interest of R. B. C.*, 183 N.J. Super. 121, 443 A.2d 271 (Juv. & Dom. Rel. Ct. 1981).
W. Va.—*State v. Leadingham*, 190 W. Va. 482, 438 S.E.2d 825 (1993).
- 2 U.S.—*Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio L. Abs. 513, 84 A.L.R.2d 933 (1961).
N.Y.—*People v. Sutton*, 47 A.D.2d 455, 366 N.Y.S.2d 500 (4th Dep't 1975).
W. Va.—*State v. Leadingham*, 190 W. Va. 482, 438 S.E.2d 825 (1993).
Evidence obtained through egregious police practices
Wis.—*State v. Samuel*, 2002 WI 34, 252 Wis. 2d 26, 643 N.W.2d 423 (2002).
N.C.—*State v. Allison*, 298 N.C. 135, 257 S.E.2d 417 (1979).
Elimination of exclusionary rule
State constitutional amendment which eliminates exclusionary rule for evidence seized in violation of State, but not federal, law does not violate Due Process Clause.
U.S.—*California v. Greenwood*, 486 U.S. 35, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988).
- 4 U.S.—*U. S. v. Payner*, 447 U.S. 727, 100 S. Ct. 2439, 65 L. Ed. 2d 468 (1980).
Serious cases
Courts should tread gingerly when faced with arguments that "fundamental fairness" component of Fifth Amendment's Due Process Clause requires suppression of evidence; only the most serious cases, which truly shock the conscience as well as the mind, call for invocation of Constitution itself rather than of court's prudential powers.
U.S.—*U.S. v. Penn*, 647 F.2d 876, 8 Fed. R. Evid. Serv. 485 (9th Cir. 1980).
- 5 **Issuance by court not "court of record"**
Admission of evidence seized pursuant to search warrant issued by state court which was not "court of record" did not violate defendants' right to due process of law.
U.S.—*U.S. v. Wilcox*, 640 F.2d 970 (9th Cir. 1981).
Issuance by lay justice
Admission in evidence of property seized under search warrant issued by lay justice court judge does not violate defendant's right to due process of law.

Cal.—*People v. Mack*, 66 Cal. App. 3d 839, 136 Cal. Rptr. 283 (3d Dist. 1977).

N.C.—*State v. Afflerback*, 46 N.C. App. 344, 264 S.E.2d 784 (1980).

Colo.—*People v. Stewart*, 38 Colo. App. 6, 553 P.2d 74 (App. 1976), judgment aff'd, 193 Colo. 399, 566 P.2d 1069 (1977).

Cal.—*People v. Claxton*, 129 Cal. App. 3d 638, 181 Cal. Rptr. 281 (5th Dist. 1982).

Ohio—*State v. Wolery*, 46 Ohio St. 2d 316, 75 Ohio Op. 2d 366, 348 N.E.2d 351 (1976).

U.S.—*U.S. v. Dale*, 614 F.3d 942 (8th Cir. 2010); *Rivera v. Lake County*, 974 F. Supp. 2d 1179 (N.D. Ill. 2013); *U.S. v. Clavijo*, 950 F. Supp. 2d 324 (D. Mass. 2013).

Cal.—*People v. Boyer*, 38 Cal. 4th 412, 42 Cal. Rptr. 3d 677, 133 P.3d 581 (2006).

Ohio—*State v. Wolery*, 46 Ohio St. 2d 316, 75 Ohio Op. 2d 366, 348 N.E.2d 351 (1976).

N.C.—*State v. Montgomery*, 291 N.C. 235, 229 S.E.2d 904 (1976).

U.S.—*U.S. v. Spivey*, 508 F.2d 146 (10th Cir. 1975).

U.S.—*U.S. v. Greenbank*, 491 F.2d 184 (9th Cir. 1974).

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16C C.J.S. Constitutional Law § 1664

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

3. Admissibility

§ 1664. Evidence of rape victim's sexual activity

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4692

Evidence of a rape victim's prior sexual activity may be barred by a rape shield law, but due process and the right of confrontation limit the application of the rape shield law in certain cases.

Evidence of a rape victim's prior consensual sexual activity may be barred by a rape shield statute,¹ but due process and the right of confrontation limit the application of the rape shield law in certain cases.² The exclusion of proffered evidence under a rape shield law violates a defendant's due process right to a fair trial if the testimony was relevant,³ the probative value of the evidence outweighs its prejudicial effect,⁴ and the State's compelling interests in excluding the evidence did not outweigh the defendant's right to present relevant evidence supportive of his or her defense.⁵

A defendant may have a due process right to introduce evidence of previous sexual relationships, despite the general prohibition of such evidence under the rape shield law where the State opens the door to such evidence.⁶

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Footnotes

- 1 U.S.—*U.S. v. Ogden*, 685 F.3d 600, 88 Fed. R. Evid. Serv. 1365 (6th Cir. 2012).
Minn.—*State v. Friend*, 493 N.W.2d 540 (Minn. 1992).
N.H.—*State v. Ellsworth*, 136 N.H. 115, 613 A.2d 473 (1992).
- 2 Minn.—*State v. Wenthe*, 845 N.W.2d 222 (Minn. Ct. App. 2014), review granted, (June 25, 2014).
N.H.—*State v. Spaulding*, 147 N.H. 583, 794 A.2d 800 (2002).
- Sixth and Fourteenth Amendments**
The rape shield statute directs the trial court to examine the defendant's constitutional rights, implicating both the Sixth Amendment right to confront witnesses and the Fourteenth Amendment due process right to call witnesses on his or her own behalf.
- 3 Conn.—*State v. Malon*, 96 Conn. App. 59, 898 A.2d 843 (2006).
W. Va.—*State v. Robert Scott R., Jr.*, 233 W. Va. 12, 754 S.E.2d 588 (2014).
- 4 N.H.—*State v. Cannon*, 146 N.H. 562, 776 A.2d 736 (2001).
W. Va.—*State v. Robert Scott R., Jr.*, 233 W. Va. 12, 754 S.E.2d 588 (2014).
- 5 W. Va.—*State v. Robert Scott R., Jr.*, 233 W. Va. 12, 754 S.E.2d 588 (2014).
- 6 Minn.—*State v. Wenthe*, 845 N.W.2d 222 (Minn. Ct. App. 2014), review granted, (June 25, 2014).

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16C C.J.S. Constitutional Law § 1665

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

3. Admissibility

§ 1665. Admissibility of other particular evidence

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4522, 4650 to 4694

The admission of various types of evidence has been found to violate or not to violate due process requirements.

A defendant is not denied due process by a rule prohibiting him or her from introducing evidence of the victim's reputation for violence to corroborate the defendant's claim that the victim was the aggressor.¹ What's more, a statute governing the introduction of evidence of a defendant's violent acts and reputation for violence does not unduly offend any fundamental principles advanced by the general practice of barring the use of propensity evidence to prove a defendant's conduct and thus does not violate due process.²

The use of an informer's testimony does not violate the accused's right to due process.³

The admission of photographs in evidence is not a violation of due process.⁴ As long as the photographs accurately represent what they purport to depict and are logically relevant,⁵ and are not cumulative or prejudicial,⁶ their extreme gruesome and prejudicial character cannot make their admission in evidence a denial of due process.⁷

A defendant is not denied due process with respect to accomplice testimony where there is ample corroboration.⁸ In fact, the federal due process requirement that sufficient evidence support every element of an offense does not require corroboration of accomplice testimony as a matter of course.⁹ Thus, a conviction based wholly on the uncorroborated testimony of an accomplice does not necessarily constitute a deprivation of due process.¹⁰ On the other hand, if the evidence has credibility problems, and the statement is not wholly self-inculpatory on the part of the accomplice, then it may be excluded.¹¹ Moreover, if an alleged accomplice is made to believe that he or she must testify in a particular fashion, the testimony becomes tainted beyond redemption and violates the accused's due process rights.¹²

Due process may permit or require the admission of expert testimony¹³ and may in some cases be violated when a criminal defendant is denied the opportunity to have an expert of his or her choosing examine a piece of critical evidence whose nature is subject to varying expert opinion; however, there is no such violation when the evidence to be evaluated is not critical.¹⁴ The exclusion of expert testimony on an ultimate question of fact does not deprive the defendant of his or her due process rights,¹⁵ in fact, such testimony is inadmissible in a criminal trial because it invades the province of the jury, thus violating the defendant's rights to due process and a fair trial.¹⁶

Victim impact evidence.

If victim impact evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.¹⁷

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Footnotes

- 1 Me.—*State v. Leone*, 581 A.2d 394 (Me. 1990).
- 2 Cal.—*People v. Fuiava*, 53 Cal. 4th 622, 137 Cal. Rptr. 3d 147, 269 P.3d 568 (2012).
- 3 Ill.—*People v. Blackburn*, 133 Ill. App. 2d 404, 273 N.E.2d 472 (1st Dist. 1971).
- 4 U.S.—*Walle v. Sigler*, 329 F. Supp. 1278 (D. Neb. 1971), order aff'd, 456 F.2d 1153 (8th Cir. 1972).
Okla.—*Coddington v. State*, 2006 OK CR 34, 142 P.3d 437 (Okla. Crim. App. 2006).
Tex.—*Lanham v. State*, 474 S.W.2d 197 (Tex. Crim. App. 1971).
Unusual type of injury
There was no violation of due process by admission of certain photographs of victim, taken at her death, in light of findings by state courts that photographs were relevant and material in light of unusual type of injury involved in the homicide and that, although pictures were taken sometime after injury was inflicted, they showed nature and extent of burns suffered by child.
U.S.—*U. S. ex rel. Cummings v. Wyrick*, 525 F. Supp. 142 (E.D. Mo. 1981).
- 5 U.S.—*U. S. ex rel. Rush v. Ziegele*, 474 F.2d 1356 (3d Cir. 1973) (disapproved of on other grounds by, *Patterson v. Cuyler*, 729 F.2d 925 (3d Cir. 1984)).
Tex.—*Caraway v. State*, 550 S.W.2d 699 (Tex. Crim. App. 1977).
Wyo.—*Alcala v. State*, 487 P.2d 448 (Wyo. 1971).
- 6 Okla.—*Coddington v. State*, 2006 OK CR 34, 142 P.3d 437 (Okla. Crim. App. 2006).
- 7 U.S.—*U. S. ex rel. Rush v. Ziegele*, 474 F.2d 1356 (3d Cir. 1973) (disapproved of on other grounds by, *Patterson v. Cuyler*, 729 F.2d 925 (3d Cir. 1984)).
Tex.—*Caraway v. State*, 550 S.W.2d 699 (Tex. Crim. App. 1977).
Wyo.—*Alcala v. State*, 487 P.2d 448 (Wyo. 1971).
- 8 U.S.—*Nolen v. Wilson*, 372 F.2d 15 (9th Cir. 1967).
- 9 Cal.—*People v. Sattiewhite*, 59 Cal. 4th 446, 174 Cal. Rptr. 3d 1, 328 P.3d 1 (2014).

- 10 U.S.—*U.S. v. De Larosa*, 450 F.2d 1057 (3d Cir. 1971).
Ind.—*Shepherd v. State*, 254 Ind. 404, 260 N.E.2d 563 (1970).
11 U.S.—*Sinkfield v. Brigano*, 487 F.3d 1013 (6th Cir. 2007).
12 **Influence of plea bargain**
Nev.—*Franklin v. State*, 94 Nev. 220, 577 P.2d 860 (1978) (overruled on other grounds by, *Sheriff, Humboldt County v. Acuna*, 107 Nev. 664, 819 P.2d 197 (1991)).
13 U.S.—*U.S. v. Crumpler*, 536 F.2d 1063 (5th Cir. 1976).
N.H.—*State v. Breest*, 116 N.H. 734, 367 A.2d 1320 (1976).
N.M.—*State v. Campbell*, 141 N.M. 543, 2007-NMCA-051, 157 P.3d 722 (Ct. App. 2007).
14 Utah—*State v. Bakalov*, 1999 UT 45, 979 P.2d 799 (Utah 1999).
15 Cal.—*People v. Coddington*, 23 Cal. 4th 529, 97 Cal. Rptr. 2d 528, 2 P.3d 1081 (2000), as modified on
denial of reh'g, (Sept. 27, 2000) and (overruled on other grounds by, *Price v. Superior Court*, 25 Cal. 4th
1046, 108 Cal. Rptr. 2d 409, 25 P.3d 618 (2001)).
16 Va.—*Jenkins v. Com.*, 254 Va. 333, 492 S.E.2d 131 (1997).
17 *State v. Ugalde*, 2013 MT 308, 372 Mont. 234, 311 P.3d 772 (2013).

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16C C.J.S. Constitutional Law § 1666

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

4. Compulsory Testimony and Self-Incrimination

§ 1666. Compulsory testimony and self-incrimination, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3855, 4663

The Fifth Amendment privilege against self-incrimination is applicable to states through the Fourteenth Amendment, and it applies to protect an individual not only from being compelled to testify against himself or herself in a criminal prosecution but also privileges him or her not to answer official questions in any proceeding criminal or civil where the answer might incriminate him or her in future criminal proceedings.

The Fifth Amendment privilege against self-incrimination is applicable to states through the Due Process Clause of the Fourteenth Amendment¹ and is afforded in any proceeding, whether civil or criminal, administrative or judicial, investigatory or adjudicatory.²

In connection with criminal prosecutions, the constitutional guaranties are not violated by inquiries not calling for compelled³ incriminating answers,⁴ or where self-incrimination is not the cause of confinement.⁵ Forcing a defendant to choose between the right to testify and the privilege against self-incrimination does not violate his or her due process rights.⁶ Upon retrial of a

criminal case, the admission of testimony the defendant gave during his or her previous trial does not violate his or her right not to testify even if he or she does not testify during the second trial.⁷

Allowing the State a mental examination of a defendant who has entered a plea of not criminally responsible and, if the defendant introduces psychiatric testimony at trial, allowing the State to present testimony by its own psychiatrist on the issue of criminal responsibility does not violate the defendant's due process rights or right against self-incrimination.⁸

Proof of the defendant's refusal to take a lie detector test is a denial of due process.⁹ However, the due process guaranty is not violated where the accused has, by consenting to a polygraph test, waived the constitutional privilege against self-incrimination.¹⁰

It is not fundamentally unfair in violation of due process to use a defendant's refusal to take a blood-alcohol test as evidence of guilt even though police failed to warn him or her that refusal could be used against him or her at trial.¹¹

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Footnotes

- 1 U.S.—*Maryland v. Shatzer*, 559 U.S. 98, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010); *Application of Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).
N.C.—*State v. Flood*, 765 S.E.2d 65 (N.C. Ct. App. 2014).
Wis.—*State v. Alexander*, 2015 WI 6, 360 Wis. 2d 292, 858 N.W.2d 662 (2015).
- 2 Ind.—*Cliff v. Indiana Dept. of State Revenue*, 660 N.E.2d 310 (Ind. 1995).
- 3 U.S.—*Chrisco v. Shafran*, 507 F. Supp. 1312 (D. Del. 1981).
S.D.—*State v. Thundershield*, 83 S.D. 414, 160 N.W.2d 408 (1968).
- 4 Mass.—*Attorney General v. Brissenden*, 271 Mass. 172, 171 N.E. 82 (1930).
- 5 Ill.—*People v. Williams*, 47 Ill. App. 3d 861, 8 Ill. Dec. 166, 365 N.E.2d 404 (1st Dist. 1977).
- 6 U.S.—*Gellis v. Casey*, 338 F. Supp. 651 (S.D. N.Y. 1972).
Cal.—*People v. Avena*, 13 Cal. 4th 394, 13 Cal. 4th 763b, 53 Cal. Rptr. 2d 301, 916 P.2d 1000 (1996), as modified, (July 18, 1996).
- 7 Ky.—*Sherley v. Com.*, 889 S.W.2d 794 (Ky. 1994).
- 8 Md.—*Hartless v. State*, 327 Md. 558, 611 A.2d 581 (1992).
Use of psychiatric report for impeachment
Use of forensic report following court-ordered psychiatric examination of defendant for purpose of impeachment did not violate defendant's right against self-incrimination or her due process rights, where her trial testimony clearly contradicted statements she made at hospital, statements she made to hospital personnel were within exception for examinations by order of court, and statements at hospital were not product of coercive police tactics.
Ark.—*Randleman v. State*, 310 Ark. 411, 837 S.W.2d 449 (1992).
- 9 U.S.—*Bowen v. Eyman*, 324 F. Supp. 339 (D. Ariz. 1970).
Ind.—*McDonald v. State*, 164 Ind. App. 285, 328 N.E.2d 436 (1975).
- 10 Mo.—*State v. Ghan*, 558 S.W.2d 304 (Mo. Ct. App. 1977).
- 11 U.S.—*South Dakota v. Neville*, 459 U.S. 553, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983).

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16C C.J.S. Constitutional Law § 1667

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

4. Compulsory Testimony and Self-Incrimination

§ 1667. Defendant's postarrest silence

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4666

Due process forbids the prosecution from using the accused's silence after receiving *Miranda* warnings either for substantive or impeachment purposes.

Due process requires that a defendant, when in the hands of the police, should be able to invoke core constitutional rights without fear of making implied or adoptive admissions,¹ and the guaranty of fundamental fairness in the Due Process Clause forbids the government from making the *Miranda* promises and breaking them by using a suspect's exercise of a right as evidence against him.² In short, due process forbids the prosecution from commenting on³ or using the accused's silence after receiving *Miranda* warnings either for substantive or impeachment purposes.⁴ To do otherwise would be fundamentally unfair.⁵ It is a violation of due process to permit an inference of guilt from a defendant's postarrest,⁶ Post-*Miranda*⁷ silence, or to inform a person under arrest that he or she has a right to remain silent and then use that silence as evidence of sanity.⁸

A defendant's exculpatory story, told for the first time at trial, may not be impeached by cross-examining the defendant about his or her failure to have told the same story after receiving *Miranda* warnings at the time of arrest⁹ regardless of whether reliance

on the *Miranda* warnings is offered as a justification in objecting to such cross-examination.¹⁰ This rule is particularly so where there is no inconsistency between the prior silence and the exculpatory testimony.¹¹

Where the trial testimony and postarrest statements are inconsistent, the general rule prohibiting the use of the defendant's silence for substantive or impeachment purposes where an exculpatory explanation is given at the trial does not preclude cross-examination regarding the failure to give the same exculpatory explanation after arrest as was given at the trial.¹² Aside from the privilege against compelled self-incrimination, in proper circumstances, silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause.¹³ Moreover, when a police officer simply testifies about the circumstances surrounding an interview, a part of which is the defendant's silence, without using the defendant's silence to impeach his or her credibility¹⁴ or as substantive evidence of guilt,¹⁵ there is no due process violation. Mere reference to a defendant's post-*Miranda* silence does not necessarily amount to a due process violation.¹⁶

On the other hand, in the absence of the sort of affirmative assurances embodied in the *Miranda* warnings,¹⁷ or even the absence of *Miranda*'s implicit promise that any silence will not be used against him or her,¹⁸ a state does not violate due process of law by permitting cross-examination as to postarrest silence when the defendant chooses to take the stand.¹⁹ A state is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony.²⁰ Furthermore, due process is not violated by the use of prearrest silence to impeach a criminal defendant's credibility,²¹ particularly where there is no indication that the defendant invoked his or her right to silence.²² This is so because it is the *Miranda* warning itself that carries with it the promise of protection; therefore, as a factual predicate to an alleged *Doyle* violation, the record must demonstrate that the defendant received a *Miranda* warning prior to the period of silence that was disclosed to the jury.²³ The Due Process Clauses of some state constitutions, however, guard against comments on a defendant's postarrest silence regardless of whether *Miranda* warnings have been given.²⁴

Curative jury instruction.

No due process error occurs if the court promptly sustains a timely objection to a question concerning postarrest silence, instructs the jury to disregard the question, and gives a curative jury instruction.²⁵

CUMULATIVE SUPPLEMENT

Cases:

The State may not seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of his arrest. [State v. Custer](#), 292 Neb. 88, 871 N.W.2d 243 (2015).

[END OF SUPPLEMENT]

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Footnotes

¹ Mass.—[Com. v. Gonzalez](#), 469 Mass. 410, 14 N.E.3d 282 (2014).

- 2 Tex.—*Ex parte Skelton*, 434 S.W.3d 709 (Tex. App. San Antonio 2014), petition for discretionary review
filed, (July 23, 2014).
- 3 Tex.—*Schragin v. State*, 378 S.W.3d 510 (Tex. App. Fort Worth 2012).
- 4 U.S.—*Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); *Ford v. Wilson*, 747 F.3d 944
(7th Cir. 2014).
- Kan.—*State v. Santos-Vega*, 299 Kan. 11, 321 P.3d 1 (2014).
- Mo.—*Mitchem v. State*, 250 S.W.3d 749 (Mo. Ct. App. W.D. 2008), as modified, (May 27, 2008).
- Under state constitution**
- N.H.—*State v. Hill*, 146 N.H. 568, 781 A.2d 979 (2001), as modified on denial of reh'g, (Oct. 25, 2001).
- As to comments by the prosecutor on a defendant's right to remain silent as a denial of due process, see
§ 1727.
- 5 Md.—*Coleman v. State*, 434 Md. 320, 75 A.3d 916 (2013).
- Self-incrimination**
- The violation of a defendant's postarrest right to remain silent once the defendant has been Mirandized,
known as a *Doyle* violation, is actually a violation of the Due Process Clause's prohibition against
fundamental unfairness, not a violation of the Fifth Amendment privilege against self-incrimination.
- Ind.—*Sobolewski v. State*, 889 N.E.2d 849 (Ind. Ct. App. 2008).
- 6 Idaho—*State v. Galvan*, 156 Idaho 379, 326 P.3d 1029 (Ct. App. 2014), review denied, (June 25, 2014).
- Nev.—*Morris v. State*, 112 Nev. 260, 913 P.2d 1264 (1996).
- Wash.—*State v. Mace*, 97 Wash. 2d 840, 650 P.2d 217 (1982).
- 7 Mich.—*People v. Shafier*, 483 Mich. 205, 768 N.W.2d 305 (2009).
- 8 U.S.—*Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986).
- Ala.—*Ex parte Myers*, 699 So. 2d 1285 (Ala. 1997).
- 9 U.S.—*Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); *Bradley v. Jago*, 594 F.2d 1100,
13 Ohio Op. 3d 401 (6th Cir. 1979); *U.S. v. Massey*, 687 F.2d 1348 (10th Cir. 1982).
- 10 U.S.—*Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).
- 11 **Alibi defense**
- Fla.—*Webb v. State*, 347 So. 2d 1054 (Fla. 4th DCA 1977).
- 12 U.S.—*Grieco v. Hall*, 641 F.2d 1029, 7 Fed. R. Evid. Serv. 1290 (1st Cir. 1981); *U.S. v. Mireles*, 570 F.2d
1287 (5th Cir. 1978).
- Ill.—*People v. Richardson*, 61 Ill. App. 3d 718, 18 Ill. Dec. 599, 377 N.E.2d 1235 (1st Dist. 1978).
- 13 U.S.—*Baxter v. Palmigiano*, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976).
- 14 Utah—*State v. Redding*, 2007 UT App 350, 172 P.3d 319 (Utah Ct. App. 2007).
- 15 Ohio—*State v. Riegenbach*, 2006-Ohio-2725, 2006 WL 1495074 (Ohio Ct. App. 5th Dist. Richland County
2006).
- 16 U.S.—*Ellen v. Brady*, 475 F.3d 5 (1st Cir. 2007).
- 17 U.S.—*Fletcher v. Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982).
- Mass.—*Com. v. Nickerson*, 386 Mass. 54, 434 N.E.2d 992, 35 A.L.R.4th 722 (1982).
- N.Y.—*People v. Savage*, 50 N.Y.2d 673, 431 N.Y.S.2d 382, 409 N.E.2d 858 (1980).
- 18 U.S.—*Salinas v. Texas*, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013).
- 19 U.S.—*Fletcher v. Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982).
- Mass.—*Com. v. Nickerson*, 386 Mass. 54, 434 N.E.2d 992, 35 A.L.R.4th 722 (1982).
- N.Y.—*People v. Savage*, 50 N.Y.2d 673, 431 N.Y.S.2d 382, 409 N.E.2d 858 (1980).
- 20 U.S.—*Fletcher v. Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982).
- Mass.—*Com. v. Nickerson*, 386 Mass. 54, 434 N.E.2d 992, 35 A.L.R.4th 722 (1982).
- N.Y.—*People v. Savage*, 50 N.Y.2d 673, 431 N.Y.S.2d 382, 409 N.E.2d 858 (1980).
- 21 U.S.—*Jenkins v. Anderson*, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980).
- Conn.—*State v. Berube*, 256 Conn. 742, 775 A.2d 966 (2001).
- Fla.—*State v. Hoggins*, 718 So. 2d 761 (Fla. 1998).
- 22 Mich.—*People v. Hall*, 2009 WL 763825 (Mich. Ct. App. 2009).
- 23 Conn.—*State v. Lee-Riveras*, 130 Conn. App. 607, 23 A.3d 1269 (2011).
- 24 Fla.—*Mack v. State*, 58 So. 3d 354 (Fla. 1st DCA 2011).

25

U.S.—[U.S. v. Lopez](#), 500 F.3d 840 (9th Cir. 2007).

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16C C.J.S. Constitutional Law § 1668

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

4. Compulsory Testimony and Self-Incrimination

§ 1668. Evidence obtained on physical examination, or from body, of accused

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4655, 4671

Admission of evidence obtained by the compulsory physical examination of the accused while in police custody does not deprive him or her of due process, but it is a denial of due process to use evidence brutally and forcibly extracted from within the body of the accused.

In criminal prosecutions, admission of evidence obtained by the compulsory physical examination of the accused while in police custody does not deprive him or her of due process of law.¹ It is a denial of due process, however, to use evidence brutally and forcibly extracted from within the body of the accused;² but the rule is otherwise where such evidence was given up by the accused voluntarily or taken without the use of brutal or shocking force against his or her person.³

The withdrawal of a blood sample in a medically approved manner, even without consent, does not deny due process.⁴ Likewise, the absence of the conscious consent to the taking of blood by a physician from an unconscious person for the purpose of making a test for intoxication, without more, does not necessarily render the taking a violation of due process.⁵ In fact, the admission of the defendant's refusal to submit to a blood-alcohol test will not infringe upon his or her federal due process rights.⁶

Furthermore, a court's admission of probative evidence pertaining to a blood draw for blood alcohol level, even if derived from a warrant application that failed to conform to state law, will not violate the defendant's due process right to a fundamentally fair trial, where the results of the blood draw are probative of the defendant's intoxication, and the defendant has the opportunity to contest their veracity and evidentiary value before the jury.⁷

Requiring the defendant to give real or physical evidence which is not within the privilege against self-incrimination does not violate due process.⁸ Thus, fingerprinting a defendant⁹ or obtaining an exemplar of his or her handwriting¹⁰ does not violate due process nor does failing to warn a defendant that his or her refusal to provide handwriting samples for comparison with other evidence could be used against him or her at trial.¹¹

As part of the due process right to obtain exculpatory evidence,¹² a motorist accused of driving under the influence of alcohol has a due process right to obtain an independent blood test,¹³ even if the driver refuses to take an initial breath test for blood-alcohol,¹⁴ unless obtaining an independent test is impracticable or exceedingly burdensome, in which case no test is constitutionally required.¹⁵ The right is violated where the defendant has timely claimed the right to an independent test and a law enforcement officer has unreasonably impeded the defendant's right to obtain the test.¹⁶

It has been held that the defendant's due process rights are not violated where a law enforcement officer fails to offer the defendant a different type of test to determine his or her blood-alcohol concentration.¹⁷ It has also been held, however, that a driver's waiver of the right to an independent test must be knowing and intelligent.¹⁸

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Footnotes

- 1 S.C.—*State v. Green*, 227 S.C. 1, 86 S.E.2d 598 (1955) (overruled on other grounds by, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)).
Removal of hair samples
U.S.—*U.S. v. Jackson*, 448 F.2d 963 (9th Cir. 1971).
- 2 U.S.—*Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952).
N.Y.—*People v. Isaacson*, 44 N.Y.2d 511, 406 N.Y.S.2d 714, 378 N.E.2d 78 (1978).
Removal of bullet
Ark.—*Bowden v. State*, 256 Ark. 820, 510 S.W.2d 879 (1974).
Contents of stomach
U.S.—*Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952).
- 3 **Evidence voluntarily removed from mouth of accused**
Cal.—*People v. Dawson*, 127 Cal. App. 2d 375, 273 P.2d 938 (2d Dist. 1954).
Ga.—*Jones v. State*, 90 Ga. App. 761, 84 S.E.2d 124 (1954).
- 4 U.S.—*Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).
Colo.—*Compton v. People*, 166 Colo. 419, 444 P.2d 263 (1968).
Pa.—*Com. v. Gordon*, 431 Pa. 512, 246 A.2d 325 (1968).
- 5 U.S.—*Breithaupt v. Abram*, 352 U.S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957).
Ga.—*Smith v. State*, 143 Ga. App. 347, 238 S.E.2d 698 (1977).
- 6 Mo.—*State v. Dvorak*, 295 S.W.3d 493 (Mo. Ct. App. E.D. 2009).
- 7 U.S.—*Freeman v. Kadien*, 684 F.3d 30 (2d Cir. 2012).
- 8 Ariz.—*State v. Spain*, 27 Ariz. App. 752, 558 P.2d 947 (Div. 2 1976).
Cal.—*People v. Sims*, 64 Cal. App. 3d 544, 134 Cal. Rptr. 566 (2d Dist. 1976).
Mo.—*Riley v. State*, 475 S.W.2d 63 (Mo. 1972).
Standing before jury
D.C.—*Hill v. U. S.*, 367 A.2d 110 (D.C. 1976).
Appearance at preliminary hearing as analogous

Cal.—[People v. Green](#), 95 Cal. App. 3d 991, 157 Cal. Rptr. 520 (1st Dist. 1979).

Absence of court order or hearing immaterial

N.Y.—[People v. Smith](#), 86 A.D.2d 251, 450 N.Y.S.2d 57 (3d Dep't 1982).

U.S. v. [McNeal](#), 463 F.2d 1180 (5th Cir. 1972); [Miller v. Eklund](#), 364 F.2d 976 (9th Cir. 1966).

Md.—[July v. State](#), 6 Md. App. 409, 251 A.2d 384 (1969).

U.S.—[U.S. v. McNeal](#), 463 F.2d 1180 (5th Cir. 1972).

Or.—[State v. Hughes](#), 252 Or. 354, 449 P.2d 445 (1969).

Additional sample of handwriting

Since procedure for obtaining handwriting exemplar is benign and scientifically controlled, it would not violate due process to require additional sample when first sample has been taken in a matter before another court and record of case does not include copy of specimen.

U.S.—[U.S. v. Blount](#), 315 F. Supp. 1321 (E.D. La. 1970).

Tenn.—[State v. Harris](#), 839 S.W.2d 54 (Tenn. 1992), reh'g denied and opinion modified, (Sept. 8, 1992).

Alaska—[Snyder v. State](#), 930 P.2d 1274 (Alaska 1996).

Mont.—[State v. Strand](#), 286 Mont. 122, 951 P.2d 552 (1997) (overruled on other grounds by, [State v. Minkoff](#), 2002 MT 29, 308 Mont. 248, 42 P.3d 223 (2002)).

Alaska—[Snyder v. State](#), 930 P.2d 1274 (Alaska 1996).

Alaska—[Snyder v. State](#), 930 P.2d 1274 (Alaska 1996).

Mont.—[State v. Beanblossom](#), 2002 MT 351, 313 Mont. 394, 61 P.3d 165 (2002).

Inadmissible for failure to follow protocol

La.—[State v. Busby](#), 893 So. 2d 161 (La. Ct. App. 3d Cir. 2005).

Unreasonable impediment

In prosecution for driving under the influence of alcohol (DUI), defendant's due process right to obtain independent blood test was violated when arresting officer told him that a blood test would result in a higher alcohol reading than a breath test; period within which defendant could make a timely request had not passed when officer made comment, and officer's statement unreasonably impeded defendant's right to obtain independent test.

Mont.—[State v. Minkoff](#), 2002 MT 29, 308 Mont. 248, 42 P.3d 223 (2002).

Ky.—[Combs v. Com.](#), 965 S.W.2d 161 (Ky. 1998).

Alaska—[Snyder v. State](#), 930 P.2d 1274 (Alaska 1996).

16C C.J.S. Constitutional Law § 1669

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

5. Confessions, Statements, and Admissions

§ 1669. Confessions, statements, and admissions, generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4662 to 4668, 4670

To satisfy due process, a confession must be voluntary and not the product of official coercion.

The Due Process Clause acts as an independent limitation on the use of a defendant's pretrial statement.¹ The inquiry into the validity of a defendant's statement is separate from the inquiry into the validity of the defendant's *Miranda* rights,² and the requirement that *Miranda* warnings be given prior to a custodial interrogation does not dispense with the due process inquiry into the voluntariness of a confession.³ While the *Miranda* rules condition the admissibility of uncounseled statement taken during a police interrogation on the State's demonstration that the defendant knowingly and intelligently waived his or her privilege against self-incrimination and his or her right to retained or appointed counsel, due process requires only that the defendant's statements be uncoerced.⁴

Due process requires that incriminating statements or confessions be voluntary,⁵ whether the confession is true or false,⁶ and whether or not other evidence supports the conviction.⁷

If a defendant's statement was the product of his or her essentially free and unconstrained choice,⁸ and was obtained without the use of coercive tactics,⁹ it was made voluntarily and may be admitted against the defendant. However, if the defendant's will was overborne and his or her capacity for self-determination critically impaired, use of the statement offends due process.¹⁰ A statement is involuntary if it is elicited through intimidation, coercion, deception, assurances,¹¹ threats, violence, direct or implied promises,¹² or other police misconduct that constitutes overreaching¹³ or by the exertion of any improper influence.¹⁴

For an incriminating statement to be involuntary under the Due Process Clause, most courts have held that the threats, promises, misinformation, or other improper tactics leading to the confession must emanate from law enforcement officials,¹⁵ and the improper tactics must be causally related to the confession.¹⁶ It has also been held, however, that coercion applied by a private party may render a defendant's confession to that private party involuntary, requiring that the confession be suppressed as violative of due process.¹⁷ Other courts, nonetheless, have declared that even if a confession is not the product of a meaningful choice (for example, when it is made in response to hallucinations or to a private person's threat), it is nonetheless voluntary within the meaning of the Due Process Clause absent some coercive police activity.¹⁸

The voluntariness of an inculpatory statement is to be determined on a case-by-case basis¹⁹ in light of the totality of the circumstances.²⁰ The determination as to the voluntariness of a defendant's confession depends upon a weighing of circumstances of pressure against the power of resistance of the person confessing.²¹ Factors bearing on the voluntariness of a statement include the characteristics of the accused,²² such as the defendant's age,²³ physical condition, maturity, education,²⁴ mental condition, emotional stability, and experience with the criminal justice system,²⁵ as well as police conduct,²⁶ including repeated and prolonged questioning and any use of physical punishment,²⁷ such as deprivation of food or sleep,²⁸ denial of access to friends and family,²⁹ and who initiated any discussion of leniency,³⁰ and the details of the interrogation,³¹ including the length of the detention³² and whether the defendant was given *Miranda* warnings.³³ The defendant's mental disability and use of drugs at the time of confession are also considered,³⁴ but such factors do not necessarily render the confession involuntary.³⁵ Trickery or deception does not make a statement involuntary unless the method was calculated to produce an untruthful confession or was offensive to due process.³⁶

The failure of police to record a defendant's statements made during an interview at the police station does not violate the defendant's due process rights.³⁷ Likewise, due process is not violated by the failure of police to videotape breaks or gaps in a defendant's interrogation.³⁸

CUMULATIVE SUPPLEMENT

Cases:

In deciding whether a defendant's will could have been overborne, so that defendant's confession was involuntary, courts may consider whether the defendant had prior experience in the criminal justice system. [U.S.C.A. Const.Amend. 5. U.S. v. Ray, 803 F.3d 244 \(6th Cir. 2015\).](#)

The voluntariness of a confession from a teenager is reviewed with special caution, for purposes of due process protection against involuntary confessions. [U.S. Const. Amend. 14. Balbuena v. Sullivan, 980 F.3d 619 \(9th Cir. 2020\).](#)

Generally telling a suspect to speak truthfully does not amount to police coercion, for purposes of due process protection against involuntary confessions. [U.S. Const. Amend. 14. Balbuena v. Sullivan, 980 F.3d 619 \(9th Cir. 2020\).](#)

Defendant's confession to murder was not rendered involuntary by deceptive or coercive police tactics that were so fundamentally unfair as to deny due process; any remarks by police were only slightly deceptive, police did not make any promises that might have induced false confession, interrogations were relatively brief, with longest one lasting just over three hours, and defendant was provided with coffee, food, cigarettes, and several opportunities to sleep. [U.S.C.A. Const.Amend. 14. People v. Jeremiah](#), 147 A.D.3d 1199, 47 N.Y.S.3d 490 (3d Dep't 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 Wyo.—[Black v. State](#), 820 P.2d 969 (Wyo. 1991).
Due process and the Fifth Amendment
 Due process and the Fifth Amendment privilege against compulsory self-incrimination are independent rights, and one may be violated even though the other is not.
 U.S.—[Ford v. Wilson](#), 747 F.3d 944 (7th Cir. 2014).
- 2 Conn.—[State v. Piorkowski](#), 236 Conn. 388, 672 A.2d 921 (1996).
 Mass.—[Com. v. Walker](#), 466 Mass. 268, 994 N.E.2d 764 (2013).
- 3 U.S.—[Dickerson v. U.S.](#), 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).
 La.—[State v. Glenn](#), 49-705 La. App. 2 Cir. 2/26/15, 2015 WL 798514 (La. Ct. App. 2d Cir. 2015).
 Mass.—[Com. v. Siny Van Tran](#), 460 Mass. 535, 953 N.E.2d 139 (2011).
- 4 Conn.—[State v. Pinder](#), 250 Conn. 385, 736 A.2d 857 (1999).
- 5 U.S.—[U.S. v. Medearis](#), 775 F. Supp. 2d 1110 (D.S.D. 2011).
 Me.—[State v. Dodge](#), 2011 ME 47, 17 A.3d 128 (Me. 2011).
 N.D.—[State v. Crabtree](#), 2008 ND 174, 756 N.W.2d 189 (N.D. 2008).
- 6 Tex.—[Kearney v. State](#), 181 S.W.3d 438 (Tex. App. Waco 2005), petition for discretionary review refused, (Apr. 5, 2006).
- 7 Kan.—[State v. Esquivel-Hernandez](#), 266 Kan. 821, 975 P.2d 254 (1999) (disapproved of on other grounds by, [State v. Swanigan](#), 279 Kan. 18, 106 P.3d 39 (2005)).
 Nev.—[Echavarria v. State](#), 108 Nev. 734, 839 P.2d 589 (1992).
 Tex.—[Sells v. State](#), 121 S.W.3d 748 (Tex. Crim. App. 2003).
- 8 Conn.—[State v. Andrews](#), 313 Conn. 266, 96 A.3d 1199 (2014).
 N.C.—[State v. Davis](#), 763 S.E.2d 585 (N.C. Ct. App. 2014).
 Pa.—[Com. v. Johnson](#), 107 A.3d 52 (Pa. 2014).
- 9 N.M.—[State v. Munoz](#), 1998-NMSC-048, 126 N.M. 535, 972 P.2d 847 (1998).
 Tex.—[Henderson v. State](#), 962 S.W.2d 544 (Tex. Crim. App. 1997).
Coercive police activity
 Coercive police activity is necessary predicate to finding that confession is not voluntary within meaning of Due Process Clause.
 U.S.—[Colorado v. Connelly](#), 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986).
Mental or physical coercion
 Kan.—[State v. Lane](#), 262 Kan. 373, 940 P.2d 422 (1997).
- 10 Conn.—[State v. Andrews](#), 313 Conn. 266, 96 A.3d 1199 (2014).
 N.C.—[State v. Davis](#), 763 S.E.2d 585 (N.C. Ct. App. 2014).
 Pa.—[Com. v. Johnson](#), 107 A.3d 52 (Pa. 2014).
- 11 N.M.—[State v. Gutierrez](#), 2011-NMSC-024, 150 N.M. 232, 258 P.3d 1024 (2011).
- 12 U.S.—[U.S. v. Muhlenbruch](#), 634 F.3d 987, 84 Fed. R. Evid. Serv. 960 (8th Cir. 2011); [U.S. v. Medearis](#), 775 F. Supp. 2d 1110 (D.S.D. 2011); [U.S. v. Holmes](#), 699 F. Supp. 2d 818 (E.D. Va. 2010), *aff'd*, 670 F.3d 586 (4th Cir. 2012).
- 13 N.M.—[State v. Gutierrez](#), 2011-NMSC-024, 150 N.M. 232, 258 P.3d 1024 (2011).

Detrimental reliance on promise

Under principles of due process, incriminating statements defendant made at prison disciplinary hearing would not be admissible against him in subsequent criminal proceeding, except for purposes of impeachment or rebuttal, where defendant had made statements in detrimental reliance on promise by prison officials that any statements he made at disciplinary hearing would not be used against him in subsequent criminal proceeding except for purposes of impeachment or rebuttal.

Mich.—*People v. Wyngaard*, 462 Mich. 659, 614 N.W.2d 143 (2000).

No presumption of physical violence

There is no presumption under Due Process Clause that confession is product of physical violence, and thus involuntary, if evidence is submitted establishing that defendant has sustained physical injury while in police custody.

Conn.—*State v. Fields*, 265 Conn. 184, 827 A.2d 690 (2003).

14 U.S.—*U.S. v. Giddins*, 57 F. Supp. 3d 481 (D. Md. 2014).

Cal.—*People v. McWhorter*, 47 Cal. 4th 318, 97 Cal. Rptr. 3d 412, 212 P.3d 692 (2009), as modified, (Oct. 14, 2009).

Mo.—*Smith v. State*, 2015 WL 1285324 (Mo. Ct. App. S.D. 2015).

15 Colo.—*People v. Miranda-Olivas*, 41 P.3d 658 (Colo. 2001).

Ga.—*Boatman v. State*, 272 Ga. 139, 527 S.E.2d 560 (2000).

Wyo.—*Lara v. State*, 2001 WY 53, 25 P.3d 507 (Wyo. 2001).

Inmate working undercover

Defendant's statement to fellow inmate who was working undercover and wearing eavesdropping device in investigation of murder of prison superintendent was involuntary in violation of guarantees of Due Process Clause.

Ill.—*People v. Easley*, 148 Ill. 2d 281, 170 Ill. Dec. 356, 592 N.E.2d 1036 (1992).

A.L.R. Library

Coercive conduct by private person as affecting admissibility of confession under state statutes or constitutional provisions—post-Connelly cases, 48 A.L.R.5th 555.

16 Cal.—*People v. Benson*, 52 Cal. 3d 754, 276 Cal. Rptr. 827, 802 P.2d 330 (1990).

Del.—*Marine v. State*, 607 A.2d 1185 (Del. 1992).

Idaho—*Hollon v. State*, 132 Idaho 573, 976 P.2d 927 (1999).

17 Mass.—*Com. v. Brandwein*, 435 Mass. 623, 760 N.E.2d 724 (2002).

Allowing coerced statement as evidence

Although no state action is involved when defendant is coerced into making confession by private individual, State participates in that violation for due process purposes by allowing coerced statements to be used as evidence.

Haw.—*State v. Bowe*, 77 Haw. 51, 881 P.2d 538, 94 Ed. Law Rep. 575, 48 A.L.R.5th 907 (1994).

18 Tex.—*Oursbourn v. State*, 259 S.W.3d 159 (Tex. Crim. App. 2008).

19 Kan.—*State v. Speed*, 265 Kan. 26, 961 P.2d 13 (1998).

La.—*State v. Glenn*, 49-705 La. App. 2 Cir. 2/26/15, 2015 WL 798514 (La. Ct. App. 2d Cir. 2015).

20 U.S.—*Withrow v. Williams*, 507 U.S. 680, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993).

Ga.—*State v. Chulpayev*, 770 S.E.2d 808 (Ga. 2015).

La.—*State v. Glenn*, 49-705 La. App. 2 Cir. 2/26/15, 2015 WL 798514 (La. Ct. App. 2d Cir. 2015).

N.D.—*State v. Goebel*, 2007 ND 4, 725 N.W.2d 578 (N.D. 2007).

21 U.S.—*Dickerson v. U.S.*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000); *U.S. v. Ganadonegro*, 805 F. Supp. 2d 1188, 86 Fed. R. Evid. Serv. 171 (D.N.M. 2011).

Ohio—*State v. Jenkins*, 192 Ohio App. 3d 276, 2011-Ohio-754, 948 N.E.2d 1011 (2d Dist. Montgomery County 2011).

False statement insufficient

Detectives' false statement that defendant's handprint had been recovered from murder scene was insufficient to render defendant's subsequent statements involuntary on due process grounds, in light of totality of circumstances indicating that defendant had made valid waiver of his *Miranda* rights prior to making statements at issue, and that defendant was coherent, alert, and responsive during interrogation.

Mass.—*Com. v. Edwards*, 420 Mass. 666, 651 N.E.2d 398 (1995).

22 U.S.—*U.S. v. Cash*, 733 F.3d 1264 (10th Cir. 2013), cert. denied, 134 S. Ct. 1569, 188 L. Ed. 2d 578 (2014).

Colo.—*Sanchez v. People*, 2014 CO 56, 329 P.3d 253 (Colo. 2014).

N.Y.—*People v. Knapp*, 124 A.D.3d 36, 995 N.Y.S.2d 869 (4th Dep't 2014), appeal withdrawn, 24 N.Y.3d 1220, 4 N.Y.S.3d 608, 28 N.E.3d 44 (2015).

U.S.—*J.D.B. v. North Carolina*, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011).

Mass.—*Com. v. Walker*, 466 Mass. 268, 994 N.E.2d 764 (2013).

U.S.—*U.S. v. Bourdet*, 477 F. Supp. 2d 164 (D.D.C. 2007).

Mass.—*Com. v. Walker*, 466 Mass. 268, 994 N.E.2d 764 (2013).

Minn.—*State v. Camacho*, 561 N.W.2d 160 (Minn. 1997).

Nev.—*Allan v. State*, 118 Nev. 19, 38 P.3d 175 (2002) (overruled on other grounds by, *Rosky v. State*, 121 Nev. 184, 111 P.3d 690 (2005)).

Defendant's youth and low intelligence

Tex.—*Lane v. State*, 933 S.W.2d 504 (Tex. Crim. App. 1996).

U.S.—*U.S. v. Irons*, 646 F. Supp. 2d 927 (E.D. Tenn. 2009).

Wash.—*State v. Aten*, 130 Wash. 2d 640, 927 P.2d 210 (1996).

Conn.—*State v. Linarte*, 107 Conn. App. 93, 944 A.2d 369 (2008).

Iowa—*State v. McCoy*, 692 N.W.2d 6 (Iowa 2005).

Nev.—*Allan v. State*, 118 Nev. 19, 38 P.3d 175 (2002) (overruled on other grounds by, *Rosky v. State*, 121 Nev. 184, 111 P.3d 690 (2005)).

U.S.—*U.S. v. Vallar*, 635 F.3d 271 (7th Cir. 2011).

Conn.—*State v. Linarte*, 107 Conn. App. 93, 944 A.2d 369 (2008).

Iowa—*State v. McCoy*, 692 N.W.2d 6 (Iowa 2005).

Minn.—*State v. Camacho*, 561 N.W.2d 160 (Minn. 1997).

Mass.—*Com. v. Magee*, 423 Mass. 381, 668 N.E.2d 339 (1996).

U.S.—*Dickerson v. U.S.*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

Mass.—*Com. v. Walker*, 466 Mass. 268, 994 N.E.2d 764 (2013).

N.H.—*In re Wesley B.*, 145 N.H. 428, 764 A.2d 888 (2000).

U.S.—*U.S. v. Vallar*, 635 F.3d 271 (7th Cir. 2011).

Conn.—*State v. Linarte*, 107 Conn. App. 93, 944 A.2d 369 (2008).

Iowa—*State v. McCoy*, 692 N.W.2d 6 (Iowa 2005).

Nev.—*Allan v. State*, 118 Nev. 19, 38 P.3d 175 (2002) (overruled on other grounds by, *Rosky v. State*, 121 Nev. 184, 111 P.3d 690 (2005)).

Mass.—*Com. v. Magee*, 423 Mass. 381, 668 N.E.2d 339 (1996).

Not conclusive

Failure to give *Miranda* warnings before oral confession does not automatically render involuntary subsequent, warned written confession, for purposes of due process analysis.

Tex.—*Corwin v. State*, 870 S.W.2d 23 (Tex. Crim. App. 1993).

Mass.—*Com. v. Magee*, 423 Mass. 381, 668 N.E.2d 339 (1996).

N.H.—*In re Wesley B.*, 145 N.H. 428, 764 A.2d 888 (2000).

Mental disability

Taking of statements of defendant who, while mentally ill, approached police officer and confessed to homicide after being advised of his *Miranda* rights and without any coercion on the part of the police did not violate due process.

U.S.—*Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986).

Cal.—*People v. Weaver*, 26 Cal. 4th 876, 111 Cal. Rptr. 2d 2, 29 P.3d 103 (2001).

N.H.—*In re Wesley B.*, 145 N.H. 428, 764 A.2d 888 (2000).

S.C.—*State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999).

Tex.—*Lugo v. State*, 299 S.W.3d 445 (Tex. App. Fort Worth 2009), petition for discretionary review refused, (Feb. 10, 2010).

Haw.—*State v. Eli*, 126 Haw. 510, 273 P.3d 1196 (2012).

N.Y.—*People v. Peppard*, 27 A.D.3d 1143, 811 N.Y.S.2d 253 (4th Dep't 2006).

R.I.—*State v. Barros*, 24 A.3d 1158 (R.I. 2011).

U.S.—*Caldwell v. Phelps*, 945 F. Supp. 2d 520 (D. Del. 2013).

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16C C.J.S. Constitutional Law § 1670

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

5. Confessions, Statements, and Admissions

§ 1670. Statements of third parties

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4668, 4670

The use at trial of an improperly obtained statement of a third party may violate the defendant's due process rights or may support a claim for malicious prosecution.

According to some courts, the admission at trial of improperly obtained statements of a third party which results in a fundamentally unfair trial violates a defendant's due process rights,¹ and a defendant is deprived of due process when his or her conviction is based, in whole or in part, upon the coerced statement of a witness² or a witness's statement that is the product of police misconduct so egregious that the statement is unreliable as a matter of law.³ According to other courts, however, where a plaintiff attempts to assert a due process claim based upon allegations that police officers coerced statements from codefendants or witnesses, he or she does not state a due process claim, but rather, a malicious prosecution claim; this is because an officer fabricating evidence that he or she knows to be false is different than getting a reluctant witness to say what may be true.⁴

Factors to consider in determining whether a statement made as a result of police misconduct include whether the witness was coached on what to say; whether investigating authorities asked questions blatantly tailored to extract a particular answer; whether authorities made a threat with consequences that would be unlawful if carried out; whether the witness was given an

express and unlawful quid pro quo; whether the State had a separate legitimate purpose for its conduct; and whether the witness was represented by an attorney at the time of the coercion or statement.⁵ A prior consistent statement made by the witness without any governmental influence indicates that the testimony is not sufficiently unreliable to deny the defendant a fair trial,⁶ and a plea agreement requiring a witness to testify truthfully does not show a violation of due process⁷ even if it also requires the witness to testify in accordance with a statement he or she has previously made.⁸

Statements exculpatory of the defendant.

If a third-party's confession is unreliable, its exclusion from the defendant's trial will not violate the defendant's due process rights.⁹ Similarly, a defendant does not have a due process right to present hearsay testimony implicating a third party in the crime charged, where the statement does not bear persuasive assurances of trustworthiness,¹⁰ has credibility problems, is not wholly self-inculpatory, or does not otherwise meet any exception to the hearsay rule.¹¹

CUMULATIVE SUPPLEMENT

Cases:

Even assuming that police detectives fabricated one arrestee's confession to robbery and tampered with or fabricated two robbery victims' identifications of that arrestee and another arrestee, arrestees were not deprived of a liberty interest, as would be required for arrestees' due process claim for fabrication of evidence; arrestees were quickly released on bond following their arrests, they were never actually tried, and even if they had needed to appear in court and to attend trial, appearing in court and attending trial would not have constituted a deprivation of liberty. [U.S.C.A. Const.Amend. 14](#); [42 U.S.C.A. § 1983](#). [Cairel v. Alderden](#), [821 F.3d 823 \(7th Cir. 2016\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Cal.—People v. Jenkins](#), [22 Cal. 4th 900](#), [95 Cal. Rptr. 2d 377](#), [997 P.2d 1044](#) (2000), as modified, (June 28, 2000).
- 2 [U.S.—Allen v. Stratton](#), [428 F. Supp. 2d 1064](#) (C.D. Cal. 2006) (coerced confession).
[Cal.—People v. Jenkins](#), [22 Cal. 4th 900](#), [95 Cal. Rptr. 2d 377](#), [997 P.2d 1044](#) (2000), as modified, (June 28, 2000).
[Kan—State v. Lloyd](#), [299 Kan. 620](#), [325 P.3d 1122](#) (2014).
- 3 [Cal.—People v. Badgett](#), [10 Cal. 4th 330](#), [41 Cal. Rptr. 2d 635](#), [895 P.2d 877](#) (1995).
[Wis.—State v. Samuel](#), [2002 WI 34](#), [252 Wis. 2d 26](#), [643 N.W.2d 423](#) (2002).
- 4 [Ill.—Taylor v. City of Chicago](#), [2015 WL 739414](#) (N.D. Ill. 2015).
- 5 [Wis.—State v. Samuel](#), [2002 WI 34](#), [252 Wis. 2d 26](#), [643 N.W.2d 423](#) (2002).
- 6 [N.M.—State v. Brown](#), [1998-NMSC-037](#), [126 N.M. 338](#), [969 P.2d 313](#) (1998).
- 7 [N.C.—State v. Gregory](#), [340 N.C. 365](#), [459 S.E.2d 638](#) (1995).
[Tenn.—State v. Bolden](#), [979 S.W.2d 587](#) (Tenn. 1998).
- 8 [Tenn.—State v. Bolden](#), [979 S.W.2d 587](#) (Tenn. 1998).
- 9 [U.S.—Rhoades v. Henry](#), [638 F.3d 1027](#) (9th Cir. 2011).
- 10 [Ga.—Inman v. State](#), [281 Ga. 67](#), [635 S.E.2d 125](#) (2006).
[Nev.—Fields v. State](#), [125 Nev. 785](#), [220 P.3d 709](#) (2009).

11

U.S.—[Sinkfield v. Brigano](#), 487 F.3d 1013 (6th Cir. 2007).

Child witnesses in child sexual abuse investigation.

There is no due process right to have child witnesses in child sexual abuse investigation interviewed in particular manner or to have investigation carried out in particular way.

U.S.—[Spencer v. Peters](#), 966 F. Supp. 2d 1146 (W.D. Wash. 2013), reconsideration denied in part, (Sept. 17, 2013) and on reconsideration in part, (Oct. 2, 2013).

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16C C.J.S. Constitutional Law § 1671

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

5. Confessions, Statements, and Admissions

§ 1671. Right to counsel

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4664(1), 4664(2)

A confession or incriminating statement is not admissible in a criminal trial, under due process principles, in the absence of full and proper warnings to the accused of his or her right to counsel, or where he or she was denied counsel after a proper request.

Generally, an accused has a due process right to have counsel present during a custodial interrogation.¹ Nevertheless, subjecting person to custodial interrogation outside presence of counsel does not itself violate the Fifth Amendment.² A confession or incriminating statement is obtained in violation of the accused's due process rights and should not be admitted where it is obtained after the accused has requested counsel during custodial interrogation.³ Moreover, where the accused is not fully and properly warned of his or her right to counsel, particularly where he or she is held incommunicado, due process precludes the admission of an incriminating statement obtained from him or her.⁴

On the other hand, the due process rights of a defendant who is fully and properly apprised of his or her right to counsel, or who declines the opportunity to have counsel present, are not violated by the admission of an incriminating statement or confession.⁵

A confession or incriminating statement made by the accused before he or she is advised of his or her right to counsel does not violate due process and is admissible where the particular statement was unsolicited and not in response to police interrogation⁶ or where the totality of the circumstances indicate that the statement or confession was freely and voluntarily given.⁷

Where a defendant has invoked his or her right to have counsel present during custodial interrogation, a valid waiver of that right may not be established by showing only that the defendant responded to further police-initiated interrogation after being again advised of his or her rights so that the admission of his or her confession after such a showing is precluded under the due process guaranty.⁸ Then again, if after a *Miranda* admonition and waiver a defendant subsequently requests counsel but thereafter initiates a statement to police, nothing in the Fifth and Fourteenth Amendments prohibits the police from merely listening to any voluntary, volunteered statements and using them against him or her at the trial.⁹ However, where the accused has invoked his right to counsel, is released from custody, and subsequently waives his or her rights, the waiver is valid.¹⁰

Evidence of a defendant's postarrest, post-*Miranda* invocation of his or her right to counsel is not permitted either as evidence of guilt or for impeachment purposes.¹¹

Noncustodial interview.

An officer's failure during an interview to advise a defendant that a private attorney is waiting to talk to him or her does not violate due process under a state constitution during the time that the interview remains noncustodial, but such a failure violates due process once the interview turns custodial.¹² Similarly, a prosecutor's statement to interrogating officers that the defendant, who is not in custody, is not entitled to an attorney does not rise to the level of outrageous government conduct so as to require suppression of a statement under due process principles where the prosecutor is merely explaining his or her opinion on an undecided question of law.¹³

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Footnotes

- 1 Fla.—*Rigterink v. State*, 66 So. 3d 866 (Fla. 2011).
Ill.—*People v. McCauley*, 163 Ill. 2d 414, 206 Ill. Dec. 671, 645 N.E.2d 923 (1994).
Ind.—*Loving v. State*, 647 N.E.2d 1123 (Ind. 1995).
- 2 U.S.—*Svitlik v. O'Leary*, 419 F. Supp. 2d 189 (D. Conn. 2006).
- 3 U.S.—*Escobedo v. State of Ill.*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964).
Mich.—*People v. Paintman*, 412 Mich. 518, 315 N.W.2d 418 (1982).
Tex.—*Hunt v. State*, 632 S.W.2d 640 (Tex. App. Dallas 1982), petition for discretionary review refused.
- 4 U.S.—*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).
Pa.—*Com. v. Davis*, 440 Pa. 123, 270 A.2d 199 (1970).
Failure to inform defendant of counsel's presence
Interrogating officers' failure to inform murder defendant that attorney retained by his father had attempted to intervene in defendant's interrogation, and their representation to attorney that "appropriate people" would be informed of his inquiry, did not rise to level of egregiousness necessary to constitute denial of defendant's federal constitutional right to due process.
Ind.—*Ajabu v. State*, 693 N.E.2d 921, 96 A.L.R.5th 669 (Ind. 1998).
Denial of access
Police conduct in denying attorney retained by defendant's family access to him during custodial interrogation and failing to tell defendant that attorney was present and available, seeking to consult with him, violated defendant's state due process rights.
Ill.—*People v. McCauley*, 163 Ill. 2d 414, 206 Ill. Dec. 671, 645 N.E.2d 923 (1994).
- 5 U.S.—*Kaplan v. U.S.*, 375 F.2d 895 (9th Cir. 1967).

Me.—[State v. Bleyl](#), 435 A.2d 1349 (Me. 1981).

N.Y.—[People v. Fox](#), 47 A.D.2d 699, 364 N.Y.S.2d 592 (3d Dep't 1975).

6 Mich.—[People v. McKenzie](#), 67 Mich. App. 356, 241 N.W.2d 205 (1976).

7 U.S.—[Feichtmeir v. U.S.](#), 389 F.2d 498 (9th Cir. 1968).

Pa.—[Com. ex rel. Green v. Myers](#), 422 Pa. 294, 220 A.2d 789 (1966).

8 U.S.—[Edwards v. Arizona](#), 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

W. Va.—[State v. Sowards](#), 167 W. Va. 896, 280 S.E.2d 721 (1981).

9 Cal.—[People v. Hensley](#), 59 Cal. 4th 788, 175 Cal. Rptr. 3d 213, 330 P.3d 296 (2014).

10 Ala.—[Ex parte Dunkins](#), 437 So. 2d 1356 (Ala. 1983).

21-month break in custody

Ga.—[State v. Bymes](#), 258 Ga. 813, 375 S.E.2d 41 (1989).

11 Mass.—[Com. v. DePace](#), 433 Mass. 379, 742 N.E.2d 1054 (2001) (abrogated on other grounds by, [Com. v. Carlino](#), 449 Mass. 71, 865 N.E.2d 767 (2007)).

12 Fla.—[McAdams v. State](#), 137 So. 3d 401 (Fla. 2d DCA 2014), review granted, 143 So. 3d 922 (Fla. 2014).

13 Colo.—[Effland v. People](#), 240 P.3d 868 (Colo. 2010).

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16C C.J.S. Constitutional Law § 1672

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

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§ 1672. Hearing and determination as to admissibility

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4667

The accused who challenges the voluntariness of a confession has a due process right to a fair hearing and a reliable determination that the confession was in fact voluntarily given.

Where a defendant alleges that his or her confession was coerced¹ or was otherwise involuntary,² the defendant is entitled under due process to a reliable determination that the confession was given voluntarily³ and not as a result of coercion or improper inducement or promises,⁴ and this requirement applies even when the confession was obtained by private investigators rather than by government law enforcement.⁵ Moreover, this determination should be uninfluenced by the truth or falsity of the confession.⁶ Absent a contemporaneous challenge to the use of the statement at trial, however, due process does not require a separate hearing as to the voluntariness of the statement.⁷

The hearing should not be held in the presence of the jury.⁸ However, the presence of the jury during a voluntariness hearing does not in and of itself violate due process as when the confession is proven voluntary.⁹

The process due at a suppression hearing may be less demanding and elaborate than the protections accorded the accused at the trial itself,¹⁰ and the court is not required to make express findings of fact concerning all disputed issues of fact bearing on voluntariness.¹¹ Due process grants a defendant who desires to testify at a pretrial hearing every reasonable opportunity to do so,¹² and a defendant's testimony cannot be admitted against him at trial on the issue of guilt unless he or she makes no objection.¹³

At a pretrial hearing concerning the suppression of a statement, the State has the burden of proving, based on the totality of the circumstances surrounding the statement,¹⁴ that the statement was voluntary.¹⁵ Generally, the due process requirement of proof beyond a reasonable doubt in criminal proceedings does not apply to suppression hearings,¹⁶ and therefore, proof usually must be by a preponderance of the evidence.¹⁷ Nevertheless, in some states, Due Process Clauses require proof beyond a reasonable doubt.¹⁸ At any rate, the trial court does not have to admit proffered evidence with the effect of allowing the defendant to testify without subjecting himself or herself to cross-examination.¹⁹

Federal habeas relief.

A state court's failure to apply its own rule by failing to conduct a voluntariness hearing as to a petitioner's pretrial statements will not rise to the level of a deprivation of due process, as would entitle the petitioner to federal habeas relief, where the federal rule governing the same situation would not require relief.²⁰

CUMULATIVE SUPPLEMENT

Cases:

Spanish-speaking detective's dual role as translator and interrogator did not support finding that suspect's post-arrest confession to murder and kidnapping was involuntary, as would violate suspect's Fifth Amendment due process rights; detective was certified Spanish translator in police department, and while use of interpreter who was not also an interrogator would have been better practice, detective's dual role alone did not demonstrate that his translations were inappropriate or misstated, whether intentionally or unintentionally. [U.S. Const. Amend. 5. State v. Sesmas, 459 P.3d 1265 \(Kan. 2020\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—[Jackson v. Denno](#), 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A.L.R.3d 1205 (1964).
Kan.—[State v. Canaan](#), 265 Kan. 835, 964 P.2d 681, 82 A.L.R.5th 675 (1998).
Miss.—[Morgan v. State](#), 681 So. 2d 82 (Miss. 1996).
- 2 Mass.—[Com. v. Serino](#), 436 Mass. 408, 765 N.E.2d 237 (2002).
Tex.—[Kearney v. State](#), 181 S.W.3d 438 (Tex. App. Waco 2005), petition for discretionary review refused, (Apr. 5, 2006).
- 3 U.S.—[Warner v. Workman](#), 814 F. Supp. 2d 1188 (W.D. Okla. 2011), *aff'd*, 520 Fed. Appx. 675 (10th Cir. 2013), cert. denied, 134 S. Ct. 924, 187 L. Ed. 2d 798 (2014).
Conn.—[State v. Linarte](#), 107 Conn. App. 93, 944 A.2d 369 (2008).
Miss.—[Pitchford v. State](#), 45 So. 3d 216 (Miss. 2010).
- 4 Miss.—[Richardson v. State](#), 722 So. 2d 481 (Miss. 1998).

- 5 Mass.—*Com. v. Miller*, 68 Mass. App. Ct. 835, 865 N.E.2d 825 (2007).
- 6 Mass.—*Com. v. Miller*, 68 Mass. App. Ct. 835, 865 N.E.2d 825 (2007).
- 7 Ga.—*Barlow v. State*, 327 Ga. App. 719, 761 S.E.2d 120 (2014).
- 8 Ga.—*State v. Peabody*, 247 Ga. 580, 277 S.E.2d 668 (1981).
Tex.—*Harty v. State*, 229 S.W.3d 849 (Tex. App. Texarkana 2007), petition for discretionary review refused, (Oct. 17, 2007) (independent determination in the absence of the jury).
Wyo.—*Witt v. State*, 892 P.2d 132 (Wyo. 1995).
- 9 U.S.—*Martinez v. Estelle*, 612 F.2d 173 (5th Cir. 1980).
- 10 U.S.—*U. S. v. Raddatz*, 447 U.S. 667, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980).
- 11 U.S.—*Erving v. Sigler*, 453 F.2d 843 (8th Cir. 1972); *Helmick v. Cupp*, 437 F.2d 321 (9th Cir. 1971).
- 12 Fla.—*Antone v. State*, 382 So. 2d 1205 (Fla. 1980).
- 13 Wis.—*Franklin v. State*, 74 Wis. 2d 717, 247 N.W.2d 721 (1976).
- 14 Cal.—*People v. Bryant*, 60 Cal. 4th 335, 178 Cal. Rptr. 3d 185, 334 P.3d 573 (2014), petition for certiorari filed, 135 S. Ct. 1841 (2015).
- 15 Fla.—*Morgan v. State*, 415 So. 2d 6 (Fla. 1982).
N.J.—*State v. P.Z.*, 152 N.J. 86, 703 A.2d 901 (1997).
- 16 Cal.—*People v. Sapp*, 31 Cal. 4th 240, 2 Cal. Rptr. 3d 554, 73 P.3d 433 (2003), as modified, (Oct. 15, 2003).
Mich.—*People v. Cheatham*, 453 Mich. 1, 551 N.W.2d 355 (1996).
N.H.—*State v. Bilodeau*, 159 N.H. 759, 992 A.2d 557 (2010).
- 17 U.S.—*U.S. v. Colasuonno*, 697 F.3d 164 (2d Cir. 2012).
- 18 U.S.—*U.S. v. Bourdet*, 477 F. Supp. 2d 164 (D.D.C. 2007).
- 19 Cal.—*People v. Sapp*, 31 Cal. 4th 240, 2 Cal. Rptr. 3d 554, 73 P.3d 433 (2003), as modified, (Oct. 15, 2003).
Ill.—*People v. Patterson*, 154 Ill. 2d 414, 182 Ill. Dec. 592, 610 N.E.2d 16 (1992).
N.H.—*State v. Bilodeau*, 159 N.H. 759, 992 A.2d 557 (2010).
- 20 Cal.—*People v. Bryant*, 60 Cal. 4th 335, 178 Cal. Rptr. 3d 185, 334 P.3d 573 (2014), petition for certiorari filed, 135 S. Ct. 1841 (2015).
U.S.—*Yeboah-Sefah v. Ficco*, 556 F.3d 53 (1st Cir. 2009).

16C C.J.S. Constitutional Law § 1673

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

6. Identification Evidence

§ 1673. General considerations pertaining to identification evidence

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4657, 4658(1) to 4658(4), 4660

A defendant has a due process right to a fair identification procedure, and the law's primary concern in protecting this right is that the identification be reliable.

A defendant has a due process right to an identification procedure that meets a certain basic standard of fairness,¹ and the primary concern of the law in protecting this right is that the identification be reliable.²

Due process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures.³ However, when an identifying witness acknowledges his or her prior extrajudicial identification of the defendant and is available to be cross-examined, the admission of the prior consistent identification for probative purposes does not offend the defendant's due process rights.⁴ Identification testimony generally needs to be excluded on due process grounds only if the improper identification involved state action.⁵ Thus, the Due Process Clause does not require preliminary judicial inquiry into the reliability of eyewitness identification that was not procured under unnecessarily suggestive

circumstances arranged by law enforcement.⁶ In other words, if an identification of a defendant is done spontaneously and is not arranged by the police, the identification is not tainted by state action and due process rights are not violated.⁷

As a general rule, a pretrial identification procedure violates due process when, under the totality of the circumstances, the procedure is so impermissibly or unnecessarily suggestive as to render the identification unreliable or give rise to a substantial likelihood of irreparable mistaken identification.⁸ This analysis is a two-step process,⁹ and the trial court need not consider whether the identification is unreliable unless it first determines that the identification procedure was unnecessarily suggestive.¹⁰ Thus, a suggestive pretrial identification procedure does not necessarily violate a defendant's right to due process;¹¹ a defendant attempting to suppress an identification on due process grounds must prove both that the identification itself was suggestive and that there was a likelihood of misidentification as a result of the identification procedure.¹²

Some states have rejected the reliability test in favor of a per se rule, under which an identification violates due process if it is merely unnecessarily suggestive.¹³

Generally, a defendant has no constitutional right to be identified by the victim in the course of a pretrial identification procedure, and the defendant's failure to receive a requested lineup does not constitute a denial of due process of law.¹⁴ However, when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve, due process requires that, upon timely request, the accused be afforded a pretrial lineup.¹⁵

A lineup identification of a defendant who is in custody on an unrelated charge does not violate his or her constitutional rights.¹⁶

Voice identifications may be admissible if they are not unnecessarily suggestive or if they are reliable despite their suggestiveness.¹⁷

The due process proscription against impermissibly suggestive identification procedures relates to the identification of persons, and not of physical evidence.¹⁸ Thus, pretrial identification by a victim of a car,¹⁹ or the seat covers from the car,²⁰ in which the crime occurred does not implicate the due process rights of accused.

CUMULATIVE SUPPLEMENT

Cases:

In determining whether improper police conduct in an eyewitness identification procedure created a substantial likelihood of misidentification in violation of the Due Process Clause, the factors affecting reliability of the identification procedure include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. [U.S.C.A. Const.Amend. 14. *Sexton v. Beaudreaux*, 138 S. Ct. 2555 \(2018\).](#)

Due process is not offended by introduction of questionable eyewitness identification; jury may observe witness, assess any alleged suggestive circumstances, and make its own determination about what weight, if any, to give it. [U.S. Const. Amend. 14. *Coleman v. City of Peoria, Illinois*, 925 F.3d 336 \(7th Cir. 2019\).](#)

Being placed in lineups, in which arrestee was mistakenly identified as a culprit, did not violate his right to due process, where the mistaken identifications were never admitted in a trial. [U.S. Const. Amend. 14. *Swanigan v. City of Chicago*, 881 F.3d 577 \(7th Cir. 2018\).](#)

Witness's degree of attention on defendant supported finding that pretrial identification of defendant was reliable and, thus, satisfied due process, in prosecution for capital murder and child abuse; witness, who was murder victim's roommate, had her attention directed at defendant when he was in apartment, witness testified that she wanted to see what defendant looked like and was trying to focus her attention on him entire time, and witness was able to describe some of defendant's clothing as well as his general appearance. [U.S. Const. Amend. 14](#). [State v. Smith](#), 475 P.3d 558 (Ariz. 2020).

Substantive due process prohibits the admission of eyewitness identifications the police obtained through unnecessarily suggestive procedures that create a substantial likelihood of misidentification. [U.S.C.A. Const. Amend. 14](#); [M.S.A. Const. Art. 1, § 7](#). [State v. Hill](#), 2015 WL 8343418 (Minn. 2015).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Ill.—People v. Grady](#), 107 Ill. App. 3d 970, 63 Ill. Dec. 677, 438 N.E.2d 608 (1st Dist. 1982).
[Mass.—Com. v. Silva-Santiago](#), 453 Mass. 782, 906 N.E.2d 299 (2009).
[N.Y.—People v. Calinda](#), 83 Misc. 2d 520, 372 N.Y.S.2d 479 (Sup 1975).
- 2 [Conn.—State v. Johnson](#), 312 Conn. 687, 94 A.3d 1173 (2014).
[Del.—Weber v. State](#), 38 A.3d 271 (Del. 2012).
[Utah—State v. Glasscock](#), 2014 UT App 221, 336 P.3d 46 (Utah Ct. App. 2014), cert. denied, 343 P.3d 708 (Utah 2015).
- 3 [U.S.—Holland v. Rivard](#), 9 F. Supp. 3d 773 (E.D. Mich. 2014).
[Cal.—People v. Avila](#), 46 Cal. 4th 680, 94 Cal. Rptr. 3d 699, 208 P.3d 634 (2009), as modified, (Aug. 12, 2009).
[Colo.—People v. Martinez](#), 2015 COA 37, 2015 WL 1655877 (Colo. App. 2015).
- 4 [Mass.—Com. v. McAfee](#), 430 Mass. 483, 722 N.E.2d 1 (1999).
- 5 [Ariz.—State v. Prion](#), 203 Ariz. 157, 52 P.3d 189 (2002).
[Ga.—Funes v. State](#), 289 Ga. 793, 716 S.E.2d 183 (2011).
[N.C.—State v. Jones](#), 216 N.C. App. 225, 715 S.E.2d 896 (2011).
- 6 [U.S.—Perry v. New Hampshire](#), 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012).
- 7 [Conn.—State v. Nieves](#), 106 Conn. App. 40, 941 A.2d 358 (2008).
- 8 [U.S.—U.S. v. Lewis](#), 838 F. Supp. 2d 689 (S.D. Ohio 2012), aff'd, 540 Fed. Appx. 512 (6th Cir. 2013), cert. denied, 134 S. Ct. 1338, 188 L. Ed. 2d 345 (2014).
[Ill.—People v. Karim](#), 367 Ill. App. 3d 67, 304 Ill. Dec. 739, 853 N.E.2d 816 (1st Dist. 2006).
[N.C.—State v. Rainey](#), 198 N.C. App. 427, 680 S.E.2d 760 (2009).
- 9 [U.S.—U.S. v. Brown](#), 636 F. Supp. 2d 1116 (D. Nev. 2009).
[Ky.—St. Clair v. Com.](#), 140 S.W.3d 510 (Ky. 2004), as modified, (Feb. 23, 2004).
[R.I.—State v. Patel](#), 949 A.2d 401 (R.I. 2008).
- 10 [Conn.—State v. Revels](#), 313 Conn. 762, 99 A.3d 1130 (2014), cert. denied, 135 S. Ct. 1451 (2015).
[La.—State v. Womack](#), 109 So. 3d 418 (La. Ct. App. 2d Cir. 2013), writ denied, 123 So. 3d 163 (La. 2013).
[R.I.—State v. Hall](#), 940 A.2d 645 (R.I. 2008).
- 11 [Vt.—State v. Findlay](#), 171 Vt. 594, 765 A.2d 483 (2000).
- 12 [U.S.—Holland v. Rivard](#), 9 F. Supp. 3d 773 (E.D. Mich. 2014).
[La.—State v. Womack](#), 109 So. 3d 418 (La. Ct. App. 2d Cir. 2013), writ denied, 123 So. 3d 163 (La. 2013).
- 13 [Mass.—Com. v. Johnson](#), 420 Mass. 458, 650 N.E.2d 1257 (1995).
[N.Y.—People v. Adams](#), 53 N.Y.2d 241, 440 N.Y.S.2d 902, 423 N.E.2d 379 (1981).
- 14 [U.S.—Ramos v. Evans](#), 2010 WL 1839743 (C.D. Cal. 2010), report and recommendation adopted, 2010 WL 1839742 (C.D. Cal. 2010), aff'd, 488 Fed. Appx. 273 (9th Cir. 2012).
[Ala.—McKinnis v. State](#), 392 So. 2d 1266 (Ala. Crim. App. 1980), writ denied, 392 So. 2d 1270 (Ala. 1981).

- 15 N.Y.—*People v. Calinda*, 83 Misc. 2d 520, 372 N.Y.S.2d 479 (Sup 1975).
U.S.—*Osumi v. Giurbino*, 445 F. Supp. 2d 1152 (C.D. Cal. 2006), *aff'd*, 312 Fed. Appx. 23 (9th Cir. 2008).
Cal.—*People v. Rivera*, 127 Cal. App. 3d 136, 179 Cal. Rptr. 384 (4th Dist. 1981).
- 16 Ga.—*Hollingsworth v. State*, 155 Ga. App. 878, 273 S.E.2d 639 (1980).
Mo.—*State v. Mason*, 588 S.W.2d 731 (Mo. Ct. App. E.D. 1979).
- 17 U.S.—*U.S. v. Recendiz*, 557 F.3d 511 (7th Cir. 2009).
Conn.—*State v. Packard*, 184 Conn. 258, 439 A.2d 983 (1981).
Wyo.—*McCone v. State*, 866 P.2d 740 (Wyo. 1993).
- 18 Cal.—*People v. Edwards*, 126 Cal. App. 3d 447, 178 Cal. Rptr. 876 (3d Dist. 1981).
- 19 Iowa—*State v. Harper*, 770 N.W.2d 316 (Iowa 2009).
- 20 Cal.—*People v. Lucas*, 60 Cal. 4th 153, 177 Cal. Rptr. 3d 378, 333 P.3d 587 (2014).

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16C C.J.S. Constitutional Law § 1674

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

6. Identification Evidence

§ 1674. Suggestiveness

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4657, 4658(1) to 4658(4), 4660

An identification procedure is impermissibly suggestive if it raises a substantial likelihood of misidentification.

The first question as to whether a pretrial identification violates due process is whether the initial identification procedure was unnecessarily or impermissibly suggestive.¹ For a witness identification procedure to violate due process, the State must, as threshold matter, improperly suggest something to the witness; that is, the State must, wittingly or unwittingly, initiate the unduly suggestive procedure.² If there are suggestive elements in the identification procedure that make it all but inevitable that the victim will identify one person as the criminal, the procedure violates due process³ because of the potential for misidentification.⁴ An identification that is not the result of a suggestive identification procedure does not violate the defendant's due process rights.⁵ The determination of impermissible suggestiveness is based on the totality of the circumstances.⁶ Thus, a suggestive identification procedure has to be unreliable under a totality of the circumstances in order to be inadmissible as a violation of due process.⁷

In determining whether a pretrial confrontation was so suggestive and conducive to irreparable mistaken identification as to deny the accused due process of law, a court must decide whether law enforcement officials conducted out-of-court procedures in such a fashion as to lead the witness to make a mistaken identification.⁸ or implicitly conveyed their opinion of criminal's identity to the witness.⁹ To avoid improper suggestiveness, nothing may be done to induce the witness to select a particular participant or subject.¹⁰ Due process precludes the generation of increased certainty on the part of a witness through a suggestive lineup or a prolonged one-on-one viewing not preceded by a proper lineup.¹¹

A lineup or photographic array is not unnecessarily suggestive if the subjects are of about the same age and have similar physical characteristics.¹² Strict identity of characteristics among members of a lineup is not necessary, as long as there is a sufficient resemblance to reasonably test the identification.¹³ On the other hand, a lineup at which the defendant is identified will be unduly suggestive, and a violation of due process where the defendant is the only who could have fit the complainant's description because the fillers were all much older, much taller, and much heavier than the defendant.¹⁴

Without more, the mere exposure of the accused to a witness in the suggestive setting of a criminal trial does not amount to the sort of impermissible confrontation with which the due process clause is concerned.¹⁵ Due process does not require rejection of otherwise admissible identification testimony simply because a witness might have seen a newspaper photograph of accused before his or her lineup or in-court identification,¹⁶ particularly where the complainant's viewing of the photograph was fortuitous and not the result of police involvement.¹⁷

Identification testimony by a witness who was previously hypnotized is not a per se violation of the accused's right to due process.¹⁸

CUMULATIVE SUPPLEMENT

Cases:

Arrestee was not deprived of due process based on claim that police officers misrepresented or withheld key evidence at his criminal trial about suggestive nature of lineup in which witness identified him and the limited nature of witness's identification, thus precluding his § 1983 due process claims against officers, where evidence claimed to have been withheld or misrepresented was in fact disclosed in a straightforward manner at trial when prosecution elicited testimony from witness that she recognized arrestee not by his face, but by color of his jacket. [U.S. Const. Amend. 5](#); [42 U.S.C.A. § 1983](#). [Dufort v. City of New York](#), 874 F.3d 338 (2d Cir. 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 Ind.—[Hubbell v. State](#), 754 N.E.2d 884 (Ind. 2001).
- 2 Cal.—[People v. Virgil](#), 51 Cal. 4th 1210, 126 Cal. Rptr. 3d 465, 253 P.3d 553 (2011).
- 3 Ark.—[Bradley v. State](#), 2009 Ark. App. 714, 370 S.W.3d 263 (2009).
- Ky.—[Brown v. Com.](#), 564 S.W.2d 24 (Ky. Ct. App. 1978).
- 4 Ariz.—[State v. Lehr](#), 201 Ariz. 509, 38 P.3d 1172 (2002), opinion supplemented, 205 Ariz. 107, 67 P.3d 703 (2003).
- Ga.—[Dee v. State](#), 273 Ga. 739, 545 S.E.2d 902 (2001).

- 5 Pa.—*Com. v. Carter*, 537 Pa. 233, 643 A.2d 61 (1994).
Conn.—*State v. Outlaw*, 216 Conn. 492, 582 A.2d 751 (1990).
D.C.—*Redmond v. U.S.*, 829 A.2d 229 (D.C. 2003).
Md.—*Jenkins v. State*, 146 Md. App. 83, 806 A.2d 682 (2002), judgment rev'd on other grounds, 375 Md. 284, 825 A.2d 1008 (2003).
 - 6 Neb.—*State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990).
 - 7 N.C.—*State v. Jones*, 216 N.C. App. 225, 715 S.E.2d 896 (2011).
 - 8 Ind.—*Goudy v. State*, 689 N.E.2d 686 (Ind. 1997).
 - 9 N.H.—*State v. Rezk*, 135 N.H. 599, 609 A.2d 391 (1992).
 - 10 N.C.—*State v. Rainey*, 198 N.C. App. 427, 680 S.E.2d 760 (2009).
Wis.—*Schaffer v. State*, 75 Wis. 2d 673, 250 N.W.2d 326 (1977) (overruled on other grounds by, *State v. Walker*, 154 Wis. 2d 158, 453 N.W.2d 127 (1990)).
- Procedures not impermissibly suggestive**
Evidence that prosecutors met with witness, told him defendant's name, and instructed him that defendant would be seated at the defense table between his attorneys did not establish that witness' in-court identification of defendant during capital murder trial was caused by impermissibly suggestive identification procedures that violated due process.
N.C.—*State v. Fowler*, 353 N.C. 599, 548 S.E.2d 684 (2001).
- Improper bolstering**
State's subpoena of victim and her mother to attend another trial of defendant on sexual battery charge, after they stated they were unsure of his identity, led to improper bolstering and suggestive identification, violating defendant's right to due process.
Miss.—*Hickson v. State*, 697 So. 2d 391 (Miss. 1997).- 11 U.S.—*Corchado v. Rabideau*, 576 F. Supp. 2d 433 (W.D. N.Y. 2008).
- 12 R.I.—*State v. Luciano*, 739 A.2d 222 (R.I. 1999).
- 13 La.—*State v. Gray*, 351 So. 2d 448 (La. 1977).
Minn.—*State v. Roan*, 532 N.W.2d 563 (Minn. 1995).
N.C.—*State v. Montgomery*, 291 N.C. 91, 229 S.E.2d 572 (1976).
- 14 N.Y.—*People v. Dobbins*, 112 A.D.3d 735, 976 N.Y.S.2d 213 (2d Dep't 2013).
- 15 Conn.—*State v. Cook*, 262 Conn. 825, 817 A.2d 670 (2003).
Wyo.—*Hogan v. State*, 908 P.2d 925 (Wyo. 1995).
- 16 U.S.—*Dupuie v. Egeler*, 552 F.2d 704 (6th Cir. 1977).
As to in-court identifications, see § 1679.
- 17 N.Y.—*People v. Stevens*, 44 A.D.3d 882, 843 N.Y.S.2d 446 (2d Dep't 2007).
- 18 U.S.—*Harker v. State of Md.*, 800 F.2d 437, 21 Fed. R. Evid. Serv. 807 (4th Cir. 1986).

16C C.J.S. Constitutional Law § 1675

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

6. Identification Evidence

§ 1675. Reliability

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4657, 4658(1) to 4658(4), 4660

A suggestive identification procedure does not violate a defendant's due process rights as long as the identification is otherwise sufficiently reliable.

The standard for determining whether a defendant's right to due process was denied is whether the pretrial identifications were reliable.¹ The suggestiveness of an identification procedure does not violate due process so long as the identification possesses sufficient indicia of reliability.² A court considers several factors to determine, from the totality of the circumstances,³ whether a suggestive identification is nonetheless reliable, including the opportunity of the witness to view the criminal at the time of the crime; the witness's degree of attention; the accuracy of his or her prior description of the criminal; the level of certainty demonstrated at the time of the identification; and the time between the crime and the confrontation,⁴ all weighed against the corrupting effect of the suggestive identification.⁵

An immediate on-the-scene identification has uniquely powerful indicia of reliability which more than counterbalance any suggestivity absent special elements of unfairness.⁶ Consequently, absent special elements of unfairness, prompt on-the-scene confrontations do not entail due process violations.⁷

CUMULATIVE SUPPLEMENT

Cases:

In determining whether improper police conduct in an eyewitness identification procedure created a substantial likelihood of misidentification in violation of the Due Process clause, reliability of the eyewitness identification is the linchpin of the evaluation. [U.S.C.A. Const.Amend. 14. Sexton v. Beaudreaux, 138 S. Ct. 2555 \(2018\).](#)

Telephonic process by which incarcerated wife participated in divorce proceedings did not violate her due process right to access to court, as trial court managed the proceedings in a way to afford wife the same opportunities to present her case and defend her rights as litigants who appear in person. [U.S. Const. Amend. 14. Matter of Kempton, 119 A.3d 198 \(N.H. 2015\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 Utah—[State v. Hubbard, 2002 UT 45, 48 P.3d 953 \(Utah 2002\).](#)
- 2 U.S.—[Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 \(1977\); U.S. v. Campbell, 609 F. Supp. 2d 674 \(E.D. Mich. 2009\).](#)
Idaho—[State v. Payne, 146 Idaho 548, 199 P.3d 123 \(2008\).](#)
La.—[State v. Womack, 109 So. 3d 418 \(La. Ct. App. 2d Cir. 2013\), writ denied, 123 So. 3d 163 \(La. 2013\).](#)
U.S.—[U.S. v. Arthur, 764 F.3d 92 \(1st Cir. 2014\).](#)
Ala.—[Shanklin v. State, 2014 WL 7236978 \(Ala. Crim. App. 2014\).](#)
Conn.—[State v. Aviles, 154 Conn. App. 470, 106 A.3d 309 \(2014\), certification denied, 316 Conn. 903, 111 A.3d 471 \(2015\).](#)
- 3 U.S.—[Davis v. Clark County, Wash., 966 F. Supp. 2d 1106 \(W.D. Wash. 2013\), on reconsideration in part, \(Sept. 9, 2013\).](#)
Cal.—[People v. Lucas, 60 Cal. 4th 153, 177 Cal. Rptr. 3d 378, 333 P.3d 587 \(2014\).](#)
La.—[State ex rel. W.H., 62 So. 3d 839 \(La. Ct. App. 4th Cir. 2011\).](#)
Identification insufficiently reliable
Totality of circumstances surrounding witness's in-court identification of robbery defendant were not sufficiently reliable to overcome unnecessarily suggestive one-man showup, in violation of due process, even though witness stated that she was sure defendant had been driving vehicle used in robbery and identified defendant a short time after robbery; witness had only fleeting opportunity to view defendant while he was allegedly inside vehicle, witness did not give particular attention to vehicle used in robbery or its occupants until after it had passed from her sight, and witness's identification of defendant prior to one-man showup was generic, scant, and uncorroborated.
Ala.—[Ex parte Frazier, 729 So. 2d 253 \(Ala. 1998\).](#)
- 4 U.S.—[U.S. v. Edwards, 563 F. Supp. 2d 977 \(D. Minn. 2008\), aff'd, 618 F.3d 802 \(8th Cir. 2010\).](#)
Neb.—[State v. Smith, 19 Neb. App. 708, 811 N.W.2d 720 \(2012\), aff'd on other grounds, 284 Neb. 636, 822 N.W.2d 401 \(2012\).](#)
N.C.—[State v. Rainey, 198 N.C. App. 427, 680 S.E.2d 760 \(2009\).](#)
- 5 D.C.—[U.S. v. Hunter, 692 A.2d 1370 \(D.C. 1997\).](#)
- 6

7 U.S.—[U.S. v. Martinez, 462 F.3d 903 \(8th Cir. 2006\)](#).

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16C C.J.S. Constitutional Law § 1676

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

6. Identification Evidence

§ 1676. Hearing

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4657, 4658(1) to 4658(4), 4660

A hearing on the admissibility of identification evidence must be fair.

Because the Due Process Clause does not require a preliminary judicial inquiry into the reliability of eyewitness identification that was not procured under unnecessarily suggestive circumstances arranged by law enforcement,¹ an evidentiary hearing is not required whenever a defendant contends that an improper identification occurred.² However, once it is determined that a pretrial suppression hearing is warranted under the circumstances of the case, due process requires that the accused be afforded a fair hearing and a reliable determination on the issue of the admissibility of identification evidence.³

It is not a requirement of due process that the hearing to determine the admissibility of identification evidence be conducted outside the presence of the jury.⁴ It is for trial court to determine if there are sufficient aspects of reliability surrounding identification to permit its use as evidence, and then it is for jury to decide what weight the identification testimony should be given.⁵ At the hearing, the defendant bears the initial burden of showing that the identification procedure was impermissibly

suggestive, and if he or she makes that showing, the State bears the burden of proving, by clear and convincing evidence, that the reliability of the identification outweighs the corrupting effect of the suggestive procedure.⁶

CUMULATIVE SUPPLEMENT

Cases:

Due process did not compel trial court to sua sponte admonish jury to ignore attempted murder victim's emotional outbursts, in which he referred to defendant as the "devil," while testifying, in order to protect jury from improper influence during trial for attempted murder and murder; responsibility fell to defense counsel to protest any objectionable testimony, it was conceivable that defense counsel would decide as a matter of strategy to allow witness to engage in emotional outbursts, and imposing duty on trial courts to intervene in such situations would risk unnecessarily enmeshing trial courts in choices best left to defense counsel. [U.S. Const. Amend. 14](#); [Cal. Penal Code §§ 187\(a\), 667](#). [People v. Reed](#), 4 Cal. 5th 989, 232 Cal. Rptr. 3d 81, 416 P.3d 68 (Cal. 2018).

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Footnotes

- 1 [U.S.—Perry v. New Hampshire](#), 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012).
- 2 [Mass.—Com. v. Walker](#), 421 Mass. 90, 653 N.E.2d 1080 (1995).
- 3 [Haw.—State v. Mitake](#), 64 Haw. 217, 638 P.2d 324 (1981).
- 4 [U.S.—Watkins v. Sowders](#), 449 U.S. 341, 101 S. Ct. 654, 66 L. Ed. 2d 549 (1981).
- 5 [Ark.—Bohanan v. State](#), 324 Ark. 158, 919 S.W.2d 198 (1996).
- 6 [Md.—Jenkins v. State](#), 146 Md. App. 83, 806 A.2d 682 (2002), judgment rev'd on other grounds, 375 Md. 284, 825 A.2d 1008 (2003).

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16C C.J.S. Constitutional Law § 1677

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Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

6. Identification Evidence

§ 1677. Showup or confrontation

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4657, 4658(1) to 4658(4)

Identification procedures in which suspects are viewed singly by a witness rather than by conducting a lineup are not per se violative of due process, and a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it.

A one-on-one pretrial identification, or showup identification, while it is inherently suggestive,¹ does not necessarily violate due process,² even if the procedure is not necessitated by exigent or special circumstances.³ In any case, exigent circumstances generally will weigh in favor of concluding that a showup identification procedure was not unnecessarily suggestive, and thus did not violate due process guarantees, because a showup procedure may be necessary to quickly confirm the identity of a suspect or to ensure the release of an innocent suspect.⁴

Generally, due process requires that showup identifications, to be admissible in evidence, not be unnecessarily suggestive⁵ and that they be reliable under the totality of the circumstances⁶ or that the showup procedure was necessary under the totality of the circumstances.⁷ If a showup identification procedure has no special elements of unfairness beyond the suggestivity inherent in

any showup, the procedure does not offend due process regardless of the reliability of the identification.⁸ Generally, the burden is on the accused to establish that a confrontation denied his or her right to due process.⁹

Some states have rejected the reliability test in favor of a per se rule, under which a showup identification violates due process if it is merely unnecessarily suggestive.¹⁰

If a pretrial confrontation at which the accused is identified is accidental and not so arranged by the authorities as to make the resulting identification virtually inevitable, there is no denial of due process.¹¹

Where a one-way mirror is used in the course of an identification procedure, whether show-up or lineup, so that the defendant does not know what occurs on the other side of the mirror, or the defendant is presented in such a way that he or she is, in practical effect, presented singly and in a context marking him or her conspicuously as the suspect, there is a prima facie violation of due process.¹² However, the use of a one-way mirror in an identification procedure is not necessarily violative of the defendant's due process rights.¹³

An identification procedure using surveillance videotape is similar to a one-on-one confrontation between the suspect and witnesses and, as such, is inherently suggestive.¹⁴ Nonetheless, it does not necessarily violate the defendant's due process rights.¹⁵

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Footnotes

- 1 U.S.—*Reynoso v. Artus*, 722 F. Supp. 2d 394 (S.D. N.Y. 2010).
D.C.—*In re M.A.C.*, 761 A.2d 32 (D.C. 2000).
Mass.—*Com. v. Figueroa*, 468 Mass. 204, 9 N.E.3d 812 (2014).
- 2 U.S.—*Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).
Mont.—*State v. Lally*, 2008 MT 452, 348 Mont. 59, 199 P.3d 818 (2008).
Neb.—*State v. Taylor*, 287 Neb. 386, 842 N.W.2d 771 (2014).
N.C.—*State v. Rawls*, 207 N.C. App. 415, 700 S.E.2d 112 (2010).
- 3 Mass.—*Com. v. Leonardi*, 413 Mass. 757, 604 N.E.2d 23 (1992).
- 4 U.S.—*Brisco v. Ercole*, 565 F.3d 80 (2d Cir. 2009).
- 5 Ind.—*Wethington v. State*, 560 N.E.2d 496 (Ind. 1990).
Procedure not unnecessarily suggestive
Identification procedure, in which witness identified defendant as defendant was leaving police station with two police officers was not unnecessarily suggestive and thus did not violate Due Process Clause; defendant was not under arrest, defendant had refused to make any statement, it was necessary for the police to make prompt identification in order to detain defendant, and there was no evidence that police at any time suggested to witness that defendant was shooter.
Conn.—*State v. Austin*, 244 Conn. 226, 710 A.2d 732 (1998).
- 6 Mont.—*State v. Schoffner*, 248 Mont. 260, 811 P.2d 548 (1991).
N.M.—*Patterson v. LeMaster*, 2001-NMSC-013, 130 N.M. 179, 21 P.3d 1032 (2001).
Ohio—*State v. Waddy*, 63 Ohio St. 3d 424, 588 N.E.2d 819 (1992), reh'g granted, opinion recalled, 71 Ohio St. 3d 1418, 642 N.E.2d 384 (1994).
- 7 Wis.—*State v. Nawrocki*, 2008 WI App 23, 308 Wis. 2d 227, 746 N.W.2d 509 (Ct. App. 2008).
- 8 D.C.—*U.S. v. Hunter*, 692 A.2d 1370 (D.C. 1997).
- 9 Cal.—*People v. Williams*, 6 Cal. App. 3d 274, 85 Cal. Rptr. 675 (5th Dist. 1970).
Ill.—*People v. Mingo*, 89 Ill. App. 3d 285, 44 Ill. Dec. 602, 411 N.E.2d 968 (1st Dist. 1980).
Mass.—*Com. v. Amaral*, 81 Mass. App. Ct. 143, 960 N.E.2d 902 (2012).

- 10 Mass.—*Com. v. Johnson*, 420 Mass. 458, 650 N.E.2d 1257 (1995).
- 11 U.S.—*U.S. v. Massaro*, 544 F.2d 547 (1st Cir. 1976).
D.C.—*Harvey v. U. S.*, 395 A.2d 92 (D.C. 1978).
Ill.—*People v. Wolf*, 48 Ill. App. 3d 736, 6 Ill. Dec. 720, 363 N.E.2d 402 (2d Dist. 1977).
A.L.R. Library
Admissibility of In-Court Identification as Affected by Pretrial Encounter that was not Result of Action by Police, Prosecutors, and the Like, 86 A.L.R.5th 463.
- 12 U.S.—*Cooper v. Picard*, 316 F. Supp. 856 (D. Mass. 1970).
Me.—*State v. Barlow Jr.*, 320 A.2d 895 (Me. 1974).
N.Y.—*People v. Rogers*, 81 A.D.2d 980, 439 N.Y.S.2d 764 (3d Dep't 1981).
- 13 **Witness had implicated defendant before showup**
Witness's observation of defendant through one-way mirror as he sat alone in another room was not unnecessarily suggestive where witness implicated defendant in murder before showup identification was even attempted and without any prompting by police; thus, admitting identification did not violate due process.
R.I.—*State v. Luciano*, 739 A.2d 222 (R.I. 1999).
- 14 Mass.—*Com. v. Austin*, 421 Mass. 357, 657 N.E.2d 458 (1995).
Not line-up
Surveillance videotape of masked perpetrator's capital murder of convenience store clerk was not "line-up" and did not require police to recreate crime with different suspects as actor in order to comply with due process requirements for admitting identification testimony.
Tex.—*Jennings v. State*, 2003 WL 21466929 (Tex. Crim. App. 2003).
- 15 Mass.—*Com. v. Austin*, 421 Mass. 357, 657 N.E.2d 458 (1995).

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16C C.J.S. Constitutional Law § 1678

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

6. Identification Evidence

§ 1678. Photographs

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4657, 4658(1), 4658(4)

A photographic identification procedure violates due process when it is so impermissibly suggestive as to give rise to a substantial likelihood of misidentification.

An identification from a photograph violates due process if it is impermissibly suggestive¹ unless it is otherwise reliable.² It is not necessarily a violation of due process to have witnesses view photographs even though the accused is in custody and available for a lineup.³

The presentation to a witness of an array of several photographs, including that of the suspect, does not constitute an impermissibly suggestive pretrial identification procedure in the absence of any unfairness or other impropriety in the conduct of the exhibit.⁴ A photographic array is impermissibly suggestive, in violation of due process, if it raises a substantial likelihood of misidentification given the totality of the circumstances.⁵ The determination whether photographic arrays are unnecessarily suggestive is made by a preponderance of the evidence that, in light of the totality of the circumstances, the procedures employed were so unnecessarily suggestive and conducive to irreparable misidentification as to deny the defendant due process

of law.⁶ Due process does not forbid the State, in the course of conducting a photographic lineup, from providing useful further information in response to the witness's request as under such circumstances, the State is not suggesting anything to the witness.⁷

The mere fact that a defendant was the only individual featured in both of two photographic arrays⁸ or in both a photographic lineup and a physical lineup⁹ will not render the procedures surrounding the identification so unduly suggestive as to deny defendant due process. Even the fact that only one photograph was shown to the witness does not necessarily render an identification invalid.¹⁰ Rather, in determining whether a particular photo array is unduly suggestive in violation of due process, what matters is not that a suspect's photo is different from the others but that the differences are such as to suggest police suspicion or culpability, such as stark irregularities suggesting that the other pictures were selected together as controls, whereas the odd picture is apt to be the suspect, or differences that mark the suspect's photo as singularly like the witness's description of the perpetrator.¹¹

The failure to accurately reconstruct all photo displays shown identification witness does not amount to a denial of due process.¹² The failure of the police to preserve photographs that are shown to the crime victim is not in and of itself a violation of due process, especially where no pretrial request is made for the photographs, and the accused is identified at the trial by witnesses other than the victim.¹³

CUMULATIVE SUPPLEMENT

Cases:

Showing a witness the same photograph of a suspect in two different arrays is not unduly suggestive, as would violate due process, where police do not otherwise urge the photo's identification. [U.S. Const. Amend. 14. *Mara v. Rilling*, 921 F.3d 48 \(2d Cir. 2019\).](#)

During murder investigation, city and county police officers' alleged "reinforcement" of witness's identification of arrestee at photo lineup, if proven, was not so coercive or abusive that it was likely to lead to false identification, and thus arrestee's due process rights were not violated; officers never confirmed that witness picked the correct suspect, officers only stated arrestee's name at end of their discussion with witness, witness did not pick another photo out of lineup before selecting arrestee, and there was no indication that witness thought that she was required to select photo from the lineup. [U.S. Const. Amend. 14. *Caldwell v. City and County of San Francisco*, 889 F.3d 1105 \(9th Cir. 2018\).](#)

Procedure through which witness identified defendant as driver of vehicle which was involved in drive-by shooting was unnecessarily suggestive, as could support finding that identification was not admissible under due process in prosecution for attempted murder, where, when witness lingered over photo of defendant, police officer stated, "trust your instincts." [U.S. Const. Amend. 14. *Young v. State*, 374 P.3d 395 \(Alaska 2016\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S.—*U.S. v. Ghayth*, 990 F. Supp. 2d 427 \(S.D. N.Y. 2014\).](#)
[Mass.—*Com. v. Martinez*, 67 Mass. App. Ct. 788, 857 N.E.2d 1096 \(2006\).](#)
[Mich.—*People v. Henry* \(Aft. Rem.\), 305 Mich. App. 127, 854 N.W.2d 114 \(2014\).](#)
- 2 [U.S.—*U.S. v. Kamahole*, 748 F.3d 984 \(10th Cir. 2014\).](#)

Conn.—*State v. Howard*, 221 Conn. 447, 604 A.2d 1294 (1992).

R.I.—*State v. Andrade*, 657 A.2d 538 (R.I. 1995).

U.S.—*U. S. ex rel. Pella v. Reid*, 527 F.2d 380 (2d Cir. 1975).

Cal.—*People v. Rist*, 16 Cal. 3d 211, 127 Cal. Rptr. 457, 545 P.2d 833 (1976).

Conn.—*State v. Williams*, 170 Conn. 618, 368 A.2d 140 (1976).

Conn.—*State v. Austin*, 244 Conn. 226, 710 A.2d 732 (1998).

Ind.—*Swigart v. State*, 749 N.E.2d 540 (Ind. 2001).

Tex.—*Braziel v. State*, 2003 WL 22250398 (Tex. Crim. App. 2003).

Wash.—*State v. Vickers*, 148 Wash. 2d 91, 59 P.3d 58 (2002).

Mass.—*Com. v. Watson*, 455 Mass. 246, 915 N.E.2d 1052 (2009).

Cal.—*People v. Ochoa*, 19 Cal. 4th 353, 79 Cal. Rptr. 2d 408, 966 P.2d 442 (1998), as modified, (Jan. 27, 1999).

Mass.—*Com. v. Wallace*, 417 Mass. 126, 627 N.E.2d 935 (1994).

R.I.—*State v. Camirand*, 572 A.2d 290 (R.I. 1990).

Different appearances

The pretrial identification process in a prosecution for murder and other charges was not so impermissibly suggestive as to violate due process; while the defendant appeared in two photographic arrays provided to the eyewitness, the two photographs used depicted the defendant with different appearances.

U.S.—*Fowler v. Joyner*, 753 F.3d 446 (4th Cir. 2014), cert. denied, 135 S. Ct. 1530 (2015).

U.S.—*Gray v. Wolfenbarger*, 2010 WL 1131494 (E.D. Mich. 2010), report and recommendation adopted, 2010 WL 1131495 (E.D. Mich. 2010).

Cal.—*People v. DeSantis*, 2 Cal. 4th 1198, 9 Cal. Rptr. 2d 628, 831 P.2d 1210 (1992), as modified on denial of reh'g, (Sept. 17, 1992).

Not impermissible suggestive

Police use of single photograph to identify drug defendant was not so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification and did not implicate due process, where before viewing single photograph to identify defendant, both identifying officers recognized defendant from earlier incident, and both officers had reasonably long period to observe defendant during drug transaction.

Del.—*Hickman v. State*, 846 A.2d 238 (Del. 2004).

Ky.—*Jacobsen v. Com.*, 376 S.W.3d 600 (Ky. 2012), as corrected, (Sept. 11, 2012).

Hudson v. Sowders, 510 F. Supp. 124 (W.D. Ky. 1981), aff'd, 698 F.2d 1220 (6th Cir. 1982).

Mich.—*People v. Adams*, 92 Mich. App. 619, 285 N.W.2d 392 (1979).

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16C C.J.S. Constitutional Law § 1679

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

E. Evidence

6. Identification Evidence

§ 1679. In-court identification

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4658(1) to 4658(3), 4659(1), 4659(2)

An in-court identification is inadmissible as a violation of due process if it is tainted by an unlawful pretrial identification.

An in-court identification is inadmissible as a violation of due process if it is tainted by an unlawful pretrial identification¹ as where it is unnecessarily suggestive and conducive to irreparable misidentification.² Some courts have declared, however, that the suggestive effect must be something so transparent as being akin to the police saying to the witness that "this is the man."³ Moreover, a witness's subsequent in-court identification may not violate a defendant's due process rights where it has a source independent of the tainted out-of-court identification⁴ and is otherwise reliable.⁵ A witness's identification may be reliable if it is based upon the witness's observations at the time and scene of the crime.⁶

Furthermore, according to some courts, a defendant has no due process basis upon which to exclude an in-court identification where there was no prior out-of-court identification.⁷ In other words, a first-time, in-court identification procedure, which has not been preceded by suggestive pretrial identification procedures, is not so impermissibly suggestive as to violate a defendant's due process rights.⁸ Moreover, due process imposes no requirement of a preliminary examination for an in-court identification.⁹

According to other courts, however, to determine whether a defendant's due process rights were violated by an admission of an in-court identification, the court uses a two-step process: first, the court must determine whether the identification procedure used was impermissibly suggestive, and if it was indeed impermissibly suggestive, the court next determines whether there was a substantial likelihood of irreparable misidentification in light of the totality of the circumstances.¹⁰ Similarly, even if an impermissibly suggestive procedure is used to obtain an in-court identification, admission of the identification evidence does not violate due process if the evidence was nevertheless reliable under the totality of the circumstances.¹¹

A denial of an in-court lineup does not amount to a denial of due process,¹² and due process does not require that a victim identify his or her assailant from a courtroom containing people of similar physical characteristics.¹³

An identification made of the defendant while he or she is seated at a prisoner's bench at his or her probable cause hearing is subject to due process requirements as to the suggestivity of the confrontation even though it is essentially an in-court confrontation.¹⁴ Requiring the defendant, in the presence of the jury, to repeat, over objection, words and sentences used during the crime by one of the perpetrators for the express purpose of allowing the victim to make an in-court identification, violates the defendant's due process rights.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

When a disputed out-of-court eyewitness identification is alleged to violate due process, an in-court identification by the eyewitness cannot be rendered admissible on basis of the independent source doctrine, previously applied to allow an in-court identification which is independent of and not tainted by an out-of-court identification; overruling *State v. Flores*, 147 N.M. 542, 226 P.3d 641, and *State v. Johnson*, 135 N.M. 567, 92 P.3d 13. N.M. Const. art. 2, § 18. *State v. Martinez*, 2021-NMSC-002, 478 P.3d 880 (N.M. 2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Velazquez v. Poole*, 614 F. Supp. 2d 284 (E.D. N.Y. 2007).
Mo.—*State v. Phillips*, 596 S.W.2d 752 (Mo. Ct. App. E.D. 1980).
Tex.—*Garcia v. State*, 563 S.W.2d 925 (Tex. Crim. App. 1978).
- 2 Conn.—*State v. Dickson*, 150 Conn. App. 637, 91 A.3d 958 (2014), certification granted in part, 314 Conn. 913, 100 A.3d 404 (2014).
Ky.—*Oakes v. Com.*, 320 S.W.3d 50 (Ky. 2010).
N.C.—*State v. Jones*, 216 N.C. App. 225, 715 S.E.2d 896 (2011).
- 3 Va.—*Smith v. Com.*, 61 Va. App. 112, 733 S.E.2d 683 (2012).
- 4 La.—*State v. Dussett*, 126 So. 3d 593 (La. Ct. App. 4th Cir. 2013), writ denied, 137 So. 3d 1214 (La. 2014).
- 5 N.C.—*State v. Jones*, 216 N.C. App. 225, 715 S.E.2d 896 (2011).
- 6 N.C.—*State v. Jones*, 216 N.C. App. 225, 715 S.E.2d 896 (2011).
- 7 Conn.—*State v. Dickson*, 150 Conn. App. 637, 91 A.3d 958 (2014), certification granted in part, 314 Conn. 913, 100 A.3d 404 (2014).
- 8 Or.—*State v. Hickman*, 355 Or. 715, 330 P.3d 551 (2014).
- 9 U.S.—*U.S. v. Whatley*, 719 F.3d 1206 (11th Cir. 2013), cert. denied, 134 S. Ct. 453, 187 L. Ed. 2d 303 (2013).

- 10 Ga.—[Wright v. State](#), 294 Ga. 798, 756 S.E.2d 513 (2014).
- 11 U.S.—[U.S. v. Greene](#), 704 F.3d 298 (4th Cir. 2013), cert. denied, 134 S. Ct. 419, 187 L. Ed. 2d 279 (2013).
- 12 U.S.—[U.S. v. Bennett](#), 675 F.2d 596 (4th Cir. 1982).
- 13 Ind.—[Emerson v. State](#), 724 N.E.2d 605 (Ind. 2000).
- 14 Mass.—[Com. v. Cincotta](#), 6 Mass. App. Ct. 812, 384 N.E.2d 1244 (1979), judgment aff'd, 379 Mass. 391, 398 N.E.2d 478 (1979).
- 15 Ohio—[State v. Naylor](#), 70 Ohio App. 2d 233, 24 Ohio Op. 3d 306, 436 N.E.2d 539 (9th Dist. Lorain County 1980).

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16C C.J.S. Constitutional Law VII XVIII F Refs.

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

F. Assistance of Counsel

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16C C.J.S. Constitutional Law § 1680

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

F. Assistance of Counsel

§ 1680. Assistance of counsel, generally

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  3856, 4800 to 4816

The requirement of the Sixth Amendment that a defendant in a criminal prosecution shall have a right to the assistance of counsel is made obligatory on the states by the Due Process Clause of the Fourteenth Amendment.

The requirement of the Sixth Amendment that a defendant in a criminal prosecution shall have a right to the assistance of counsel is made obligatory on the states by the Due Process Clause of the Fourteenth Amendment.¹ Moreover, a defendant is entitled as a matter of due process to be informed that he or she is entitled to counsel,² and a failure to permit any defendant to have counsel represents a deprivation of that defendant's constitutional rights.³ This right is indispensable to the fair administration of the adversarial system of criminal justice.⁴

It is a deprivation of due process of law to deny a defendant his or her right to the assistance of counsel in the preparation for, and conduct of, the trial.⁵ Thus, it is a deprivation of due process of law to deny a defendant his or her right to consult,⁶ communicate,⁷ or confer⁸ privately with such counsel, to investigate the case⁹ and to prepare a defense for trial.¹⁰ In fact, an intrusion upon a client-lawyer conference contravenes the sense of traditional fair play and due process whether that intrusion occurs in the privacy of an office or at the counsel table in court.¹¹ The governmental misconduct in deliberately intruding into the attorney-client relationship and the prejudice suffered by a defendant, however, must be very severe for the court to

conclude that the government's misconduct violates fundamental fairness, shocking to the universal sense of justice mandated by the Due Process Clause.¹²

While the trial court's failure to provide defense counsel with an opportunity to present a closing argument violates defendant's due process rights to the assistance of counsel,¹³ allowing a relatively short period of time for a closing argument is not a denial of due process.¹⁴

The harmless error doctrine has a significant role in the due process concept and may not be automatically ruled out in cases where defendant is not represented by counsel.¹⁵ In determining whether defendant in a criminal prosecution has been deprived of due process of law because of the denial of counsel, defendant's background, training, experience, and conduct will be considered.¹⁶

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Footnotes

- 1 U.S.—*Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *Anders v. State of Cal.*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).
Ind.—*Bassett v. State*, 895 N.E.2d 1201 (Ind. 2008).
Mich.—*People v. Vaughn*, 491 Mich. 642, 821 N.W.2d 288 (2012).
Mo.—*State ex rel. Missouri Public Defender Com'n v. Waters*, 370 S.W.3d 592 (Mo. 2012).
Scope of application
Texas courts do not recognize any difference in scope or operation between Fourteenth Amendment right to due process and Sixth Amendment right to assistance of counsel; instead, Texas courts apply same standard to claims of violations of both amendments.
U.S.—*Williams v. Estelle*, 416 F. Supp. 1073 (N.D. Tex. 1976).
- 2 Mich.—*People v. Stearns*, 380 Mich. 704, 158 N.W.2d 409 (1968).
N.C.—*State v. Pickens*, 20 N.C. App. 63, 200 S.E.2d 405 (1973).
Okla.—*Dobbs v. State*, 1970 OK CR 124, 473 P.2d 260 (Okla. Crim. App. 1970).
- 3 Ind.—*Reese v. State*, 953 N.E.2d 1207 (Ind. Ct. App. 2011).
- 4 Wis.—*State v. Forbush*, 2011 WI 25, 332 Wis. 2d 620, 796 N.W.2d 741 (2011).
- 5 U.S.—*Chandler v. Fretag*, 348 U.S. 3, 75 S. Ct. 1, 99 L. Ed. 4 (1954).
Fla.—*State v. Allen*, 548 So. 2d 762 (Fla. 1st DCA 1989).
Ind.—*Moore v. State*, 273 Ind. 3, 401 N.E.2d 676 (1980).
- 6 U.S.—*Kansas v. Ventris*, 556 U.S. 586, 129 S. Ct. 1841, 173 L. Ed. 2d 801 (2009).
- 7 U.S.—*Mendoza v. U.S.*, 755 F.3d 821 (7th Cir. 2014).
- 8 U.S.—*Chandler v. Fretag*, 348 U.S. 3, 75 S. Ct. 1, 99 L. Ed. 4 (1954).
Ala.—*Garrett v. State*, 248 Ala. 612, 29 So. 2d 8 (1947).
Wash.—*State v. Hartwig*, 36 Wash. 2d 598, 219 P.2d 564 (1950).
- 9 U.S.—*Kansas v. Ventris*, 556 U.S. 586, 129 S. Ct. 1841, 173 L. Ed. 2d 801 (2009).
- 10 U.S.—*Kansas v. Ventris*, 556 U.S. 586, 129 S. Ct. 1841, 173 L. Ed. 2d 801 (2009).
Okla.—*Williams v. State*, 89 Okla. Crim. 95, 205 P.2d 524 (1949).
Wash.—*State v. Hartwig*, 36 Wash. 2d 598, 219 P.2d 564 (1950).
- 11 N.Y.—*People v. Gamble*, 18 N.Y.3d 386, 941 N.Y.S.2d 1, 964 N.E.2d 372 (2012).
- 12 U.S.—*U.S. v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027 (D. Nev. 2006).
- 13 Ohio—*City of Columbus v. Stennett*, 70 Ohio App. 2d 123, 24 Ohio Op. 3d 163, 434 N.E.2d 1376 (10th Dist. Franklin County 1980).
- 14 R.I.—*State v. Pemental*, 434 A.2d 932 (R.I. 1981).
- 15 N.Y.—*People v. Padgett*, 32 A.D.2d 672, 300 N.Y.S.2d 612 (2d Dep't 1969), judgment aff'd, 27 N.Y.2d 841, 316 N.Y.S.2d 637, 265 N.E.2d 460 (1970).

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N.M.—[State v. Coates, 1967-NMSC-199, 78 N.M. 366, 431 P.2d 744 \(1967\)](#).

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16C C.J.S. Constitutional Law § 1681

Corpus Juris Secundum | June 2021 Update

Constitutional Law

Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

F. Assistance of Counsel

§ 1681. Waiver of right to counsel

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4811

The standards for determining a waiver of counsel are of constitutional dimension and applicable to the states under the Due Process Clause of the Fourteenth Amendment, and in order to comply with the requirements of due process, a waiver of the right to counsel must be made voluntarily, knowingly, and intelligently.

The standards for determining a waiver of counsel are of constitutional dimension and applicable to the states under the Due Process Clause of the Fourteenth Amendment.¹ In order to comply with the requirements of due process, the trial court cannot presume that a party waived his or her right to the assistance of counsel from a silent record.² Instead, a waiver of the right to counsel must be made voluntarily, knowingly, and intelligently,³ and when a competent and intelligent waiver of this right is made, there is no denial of due process.⁴

Neither the right to the assistance of counsel in criminal cases nor the general right to due process guarantees a criminal defendant's right to waive counsel,⁵ and the competency standard for waiving the right to counsel is the same as the competency standard for standing trial.⁶ Accordingly, due process requires a trial court to hold a hearing, sua sponte, on the defendant's competence to waive counsel whenever the trial judge entertains or reasonably should entertain a good-faith doubt as to the defendant's ability to understand the nature and consequences of the waiver, to participate intelligently in the proceedings, or

to make a reasoned choice among the alternatives presented.⁷ A failure to hold such a hearing denies due process of law, where the evidence indicates that defendant's decision to waive counsel is not the product of a reasoned choice but, rather, the product of a mental illness.⁸ Depending on the circumstances, the acceptance of the defendant's waiver of right to counsel without a fitness hearing is not necessarily a denial of due process.⁹

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Footnotes

- 1 Ala.—*Ex parte Arthur*, 711 So. 2d 1097 (Ala. 1997).
Ill.—*People v. Burton*, 184 Ill. 2d 1, 234 Ill. Dec. 437, 703 N.E.2d 49 (1998).
- 2 Ohio—*In re J.S.*, 184 Ohio App. 3d 310, 2009-Ohio-5189, 920 N.E.2d 1011 (6th Dist. Williams County 2009).
- 3 U.S.—*Carnley v. Cochran*, 369 U.S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962); *Spanbauer v. Burke*, 374 F.2d 67 (7th Cir. 1966).
Ariz.—*State v. Cornell*, 179 Ariz. 314, 878 P.2d 1352 (1994).
Ark.—*McIntyre v. State*, 242 Ark. 229, 412 S.W.2d 826 (1967).
Cal.—*People v. Barnum*, 29 Cal. 4th 1210, 131 Cal. Rptr. 2d 499, 64 P.3d 788 (2003).
Neb.—*State v. Moore*, 203 Neb. 94, 277 N.W.2d 554 (1979).
Mo.—*State v. Shafer*, 969 S.W.2d 719 (Mo. 1998).
Ohio—*State v. Taylor*, 98 Ohio St. 3d 27, 2002-Ohio-7017, 781 N.E.2d 72 (2002).
Pa.—*Com. ex rel. Sheeler v. Burke*, 367 Pa. 152, 79 A.2d 654 (1951).
Tex.—*Moore v. State*, 999 S.W.2d 385 (Tex. Crim. App. 1999).
Wis.—*State v. Dean*, 98 Wis. 2d 74, 295 N.W.2d 23 (Ct. App. 1980), decision aff'd, 103 Wis. 2d 228, 307 N.W.2d 628 (1981).
- 4 U.S.—*U. S. ex rel. Miner v. Erickson*, 303 F. Supp. 960 (D.S.D. 1969), judgment aff'd, 428 F.2d 623 (8th Cir. 1970).
Fla.—*Witt v. State*, 342 So. 2d 497 (Fla. 1977).
Kan.—*Tyrell v. State*, 199 Kan. 142, 427 P.2d 500 (1967).
Mass.—*Com. v. Fillippini*, 2 Mass. App. Ct. 179, 310 N.E.2d 147 (1974).
Mich.—*People v. Lee*, 8 Mich. App. 686, 155 N.W.2d 276 (1967).
Mont.—*Petition of Eldiwitw*, 153 Mont. 468, 457 P.2d 909 (1969).
N.H.—*State v. Linsky*, 117 N.H. 866, 379 A.2d 813 (1977).
N.J.—*State v. La Salle*, 19 N.J. Super. 510, 89 A.2d 94 (App. Div. 1952).
Okla.—*McRae v. Page*, 1967 OK CR 136, 430 P.2d 851 (Okla. Crim. App. 1967).
- 5 Cal.—*People v. Lightsey*, 54 Cal. 4th 668, 143 Cal. Rptr. 3d 589, 279 P.3d 1072 (2012).
- 6 Ariz.—*State v. Gunches*, 225 Ariz. 22, 234 P.3d 590 (2010).
- 7 U.S.—*Flye v. Parratt*, 650 F.2d 152 (8th Cir. 1981); *Evans v. Raines*, 534 F. Supp. 791 (D. Ariz. 1982).
- 8 U.S.—*Evans v. Raines*, 534 F. Supp. 791 (D. Ariz. 1982).
- 9 **Possible insanity plea**
Trial judge's acceptance of defendant's waiver of right to counsel without fitness hearing after hearing judge had previously determined that defendant was incapable of waiving his right to counsel and proceeding pro se was not denial of due process.
Ill.—*People v. Barnard*, 95 Ill. App. 3d 1132, 51 Ill. Dec. 518, 420 N.E.2d 1076 (5th Dist. 1981).

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16C C.J.S. Constitutional Law § 1682

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

F. Assistance of Counsel

§ 1682. Right to appear and defend in person

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 3856, 4811

West's Key Number Digest, [Criminal Law](#) 🔑 1750

The Sixth Amendment to the Federal Constitution, as made applicable to the states by the Fourteenth Amendment, guarantees that a defendant in a state criminal trial has an independent constitutional right of self-representation and that defendant may proceed to defend himself or herself without counsel when he or she voluntarily and intelligently elects to do so.

The Sixth Amendment to the Federal Constitution, as made applicable to the states by the Fourteenth Amendment, guarantees that defendant in a state criminal trial has an independent constitutional right of self-representation¹ and that defendant may proceed to defend himself or herself without counsel when he or she voluntarily and intelligently elects to do so.² A state may not force a lawyer on defendant when he or she insists that he or she wants to conduct his or her own defense.³ In fact, reversible error may occur if a trial court attempts to force an attorney on an unwilling defendant.⁴ On the other hand, the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his or her own lawyer.⁵

Because of the substantial hazards inherent in proceeding without the benefit of counsel,⁶ the right to self-representation is not absolute⁷ or automatic.⁸ Instead, to satisfy Fifth Amendment concerns, defendant must be made aware of the dangers of self-representation⁹ and a trial court must be satisfied that the decision is made on the basis of a knowing, intelligent, and competent assessment of these risks.¹⁰

There is no infringement of the defendant's rights and hence no denial of due process where he or she shows some familiarity with legal procedure and in fact conducts his or her own defense in a capable manner.¹¹ Where there has been a pro se defense after a waiver of counsel, defendant may only claim that the proceedings were so unfair as to deny him or her due process when the trial viewed as a whole amounts to a travesty of justice.¹² It has been held, however, that in view of the defendant's unswerving resolution to pursue his or her own strategy and consciously to disregard attorneys who might have helped him or her, defendant was not denied due process rights although his or her pro se performance was disastrous.¹³

Mental illness.

A state is not required to allow a defendant who has a mental illness but is competent to stand trial to represent himself or herself.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

Trial judges are entitled, indeed encouraged, to warn defendants of the risks that attend self-representation; however, they are required to honor the defendant's wishes, assuming that the defendant is generally competent. [U.S. Const. Amend. 6. *Tatum v. Foster*, 847 F.3d 459 \(7th Cir. 2017\).](#)

Forcing a lawyer upon an unwilling defendant is contrary to his basic Sixth Amendment right to defend himself if he truly wants to do so. [U.S. Const. Amend. 6. *United States v. Muho*, 978 F.3d 1212 \(11th Cir. 2020\).](#)

Trial court's offer of counsel to pro se capital murder defendant, which included procedural benefit of permitting counsel to refile and relitigate defendant's previously denied motions, did not violate defendant's Sixth Amendment right to self-representation; trial court did not force defendant against his will to accept counsel, but rather offered counsel to defendant, and defendant accepted, and trial court fully respected defendant's Sixth Amendment rights by permitting him to waive his right to self-representation, reassert his right of self-representation at later date, and to represent himself at trial. [U.S. Const. Amend. 6. *Pasha v. State*, 225 So. 3d 688 \(Fla. 2017\).](#)

The right to self-representation is not absolute. (Per Dougherty, J., with two judges concurring and four judges concurring in result.) [U.S. Const. Amend. 6; Pa. Const. art. 1, § 9. *Commonwealth v. Tighe*, 224 A.3d 1268 \(Pa. 2020\).](#)

[END OF SUPPLEMENT]

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Footnotes

1 Iowa—[State v. Mott](#), 759 N.W.2d 140 (Iowa Ct. App. 2008).

Tex.—*Bansal v. State*, 169 S.W.3d 371 (Tex. App. Beaumont 2005), petition for discretionary review refused, (Feb. 8, 2006).

U.S.—*Marshall v. Rodgers*, 133 S. Ct. 1446, 185 L. Ed. 2d 540 (2013); *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *Moody v. Thomas*, 2015 WL 1004683 (N.D. Ala. 2015).

Ga.—*McDaniel v. State*, 327 Ga. App. 673, 761 S.E.2d 82 (2014).

U.S.—*Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

Cal.—*People v. James*, 202 Cal. App. 4th 323, 136 Cal. Rptr. 3d 85 (1st Dist. 2011), as modified on denial of reh'g, (Jan. 20, 2012).

Conn.—*State v. Braswell*, 145 Conn. App. 617, 76 A.3d 231 (2013), certification granted, 310 Conn. 939, 79 A.3d 892 (2013).

Ga.—*Taylor v. Ricketts*, 239 Ga. 501, 238 S.E.2d 52 (1977).

Minn.—*Francis v. State*, 781 N.W.2d 892 (Minn. 2010).

Wyo.—*Scott v. State*, 2012 WY 86, 278 P.3d 747 (Wyo. 2012).

U.S. v. *Mosley*, 607 F.3d 555 (8th Cir. 2010).

U.S.—*Africa v. Anderson*, 542 F. Supp. 224 (E.D. Pa. 1982).

Cal.—*People v. Gardner*, 231 Cal. App. 4th 945, 180 Cal. Rptr. 3d 528 (1st Dist. 2014), review denied, (Feb. 18, 2015).

Conn.—*State v. Connor*, 152 Conn. App. 780, 100 A.3d 877 (2014), certification granted in part, 915 Conn. 903, 104 A.3d 757 (2014).

Nev.—*Watson v. State*, 335 P.3d 157, 130 Nev. Adv. Op. No. 76 (Nev. 2014).

U.S.—*U.S. v. Mosley*, 607 F.3d 555 (8th Cir. 2010).

Pa.—*Com. v. Clyburn*, 2012 PA Super 47, 42 A.3d 296 (2012).

Wash.—*State v. Coley*, 180 Wash. 2d 543, 326 P.3d 702 (2014), cert. denied, 135 S. Ct. 1444 (2015).

Standby counsel

Trial court did not abuse its discretion or violate defendant's Sixth and Fourteenth Amendment rights in placing reasonable limitations on role of standby counsel appointed by court for defendant who elected to proceed pro se where defendant was fully apprised before trial of standby counsel's limited role and never requested that standby counsel take over representing him, and defendant was allowed to exercise his constitutional right to represent himself at trial.

Mass.—*Molino v. Dubois*, 848 F. Supp. 11 (D. Mass. 1994).

Denial of self-representation

The trial court's denial of capital murder defendant's request to appear pro se did not violate due process where defendant did not provide a clear answer to the court when he was asked whether he understood his right to counsel and whether wanted to waive that right.

Ohio—*State v. Ahmed*, 103 Ohio St. 3d 27, 2004-Ohio-4190, 813 N.E.2d 637 (2004).

Ga.—*Cook v. State*, 297 Ga. App. 701, 678 S.E.2d 160 (2009).

U.S.—*Africa v. Anderson*, 542 F. Supp. 224 (E.D. Pa. 1982).

Cal.—*People v. Jenkins*, 22 Cal. 4th 900, 95 Cal. Rptr. 2d 377, 997 P.2d 1044 (2000), as modified, (June 28, 2000).

U.S.—*Quicksall v. People of State of Mich.*, 339 U.S. 660, 70 S. Ct. 910, 94 L. Ed. 1188 (1950); *Mahoney v. Chapman*, 173 F.2d 569 (5th Cir. 1949).

Ala.—*Smith v. State*, 34 Ala. App. 194, 38 So. 2d 287 (1948).

Fla.—*Johnson v. Mayo*, 40 So. 2d 134 (Fla. 1949).

Mass.—*Allen v. Com.*, 324 Mass. 558, 87 N.E.2d 192 (1949).

Miss.—*Odom v. State*, 205 Miss. 572, 37 So. 2d 300 (1948).

N.C.—*State v. Cruse*, 238 N.C. 53, 76 S.E.2d 320 (1953).

Accused as own counsel

Defendant's due process rights were not violated, in arson prosecution in which defendant proceeded pro se, by his being denied tools necessary to defend himself, such as access to a telephone, a law library, and a writing implement; defendant did not make his request until after trial began, and trial justice and his clerk helped defendant contact witnesses, which included ensuring defendant had access to improved phone service.

R.I.—*State v. Bruyere*, 751 A.2d 1285 (R.I. 2000).

- 12 N.Y.—[People v. McIntyre](#), 36 N.Y.2d 10, 364 N.Y.S.2d 837, 324 N.E.2d 322 (1974).
13 Wash.—[State v. Anderson](#), 23 Wash. App. 445, 597 P.2d 417 (Div. 2 1979).
14 N.J.—[State v. McNeil](#), 405 N.J. Super. 39, 963 A.2d 358 (App. Div. 2009).

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16C C.J.S. Constitutional Law § 1683

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

F. Assistance of Counsel

§ 1683. Counsel of own choice

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 4810

In a criminal prosecution, due process comprises a right to appear and defend with counsel of one's own choice.

In a criminal prosecution, due process comprises a right to appear and defend with counsel of one's own choice,¹ which includes reasonable time and a fair opportunity to secure such counsel,² and the right to discharge counsel whom the defendant has hired but no longer wishes to retain.³ The court must balance, however, the defendant's interest in new counsel against the disruption, if any, flowing from any substitution.⁴ In any case, due process is generally denied when counsel is imposed upon a defendant against his or her will,⁵ and an arbitrary denial of a justified motion for substitution of counsel is an abuse of discretion.⁶

Although the right of a criminal defendant to counsel of his or her own choice is a matter of constitutional due process, it is not an absolute one which may be exercised by a defendant under any and all circumstances.⁷ There is no unlimited opportunity to obtain alternate counsel.⁸

Use of forfeitable assets.

Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his or her choosing, that protection does not go beyond the individual's right to spend his or her own money to obtain counsel, and accordingly, neither the Fifth Amendment right to due process nor the Sixth Amendment right to counsel requires Congress to permit a defendant to use assets adjudged to be forfeitable to pay that defendant's legal fees.⁹

CUMULATIVE SUPPLEMENT

Cases:

When the district court conducts a hearing on a defendant's pro se motion for the appointment of substitute counsel at which the defendant is given a meaningful opportunity to present evidence of his or her alleged justifiable dissatisfaction with his or her current counsel, the defendant has received all of the process to which he or she is constitutionally entitled. [U.S.C.A. Const.Amends. 6, 14. State v. Moyer, 360 P.3d 384 \(Kan. 2015\).](#)

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Footnotes

- 1 U.S.—[U.S. v. Kikumura, 947 F.2d 72 \(3d Cir. 1991\)](#); [U.S. v. Bowe, 221 F.3d 1183 \(11th Cir. 2000\)](#).
Ariz.—[Pipkins v. Helm, 132 Ariz. 237, 644 P.2d 1323 \(Ct. App. Div. 2 1982\)](#).
Cal.—[People v. Dowdell, 227 Cal. App. 4th 1388, 174 Cal. Rptr. 3d 547 \(6th Dist. 2014\)](#).
Del.—[Stevenson v. State, 709 A.2d 619 \(Del. 1998\)](#).
D.C.—[Yancey v. U.S., 755 A.2d 421 \(D.C. 2000\)](#).
Ga.—[Johnson v. State, 139 Ga. App. 829, 229 S.E.2d 772 \(1976\)](#).
Iowa—[State v. Williams, 285 N.W.2d 248 \(Iowa 1979\)](#).
La.—[People v. Lara, 86 Cal. App. 4th 139, 103 Cal. Rptr. 2d 201 \(5th Dist. 2001\)](#).
N.C.—[State v. Robinson, 290 N.C. 56, 224 S.E.2d 174 \(1976\)](#).
Scope of constitutional guaranty
Sixth and Fourteenth Amendments to the United States Constitution assure to defendant in criminal case right to legal counsel of his or her choosing, but these constitutional guarantees are limited to those attorneys licensed to practice in jurisdiction where defendant stands charged except that when foreign counsel has been admitted pro hac vice, admission cannot thereafter, without cause, be revoked.
Okla.—[Smith v. Brock, 1975 OK 27, 532 P.2d 843 \(Okla. 1975\)](#).
- 2 U.S.—[Chandler v. Fretag, 348 U.S. 3, 75 S. Ct. 1, 99 L. Ed. 4 \(1954\)](#); [U.S. v. Kikumura, 947 F.2d 72 \(3d Cir. 1991\)](#).
Miss.—[Watson v. State, 196 So. 2d 893 \(Miss. 1967\)](#).
R.I.—[State v. Dias, 118 R.I. 499, 374 A.2d 1028 \(1977\)](#).
- 3 Cal.—[People v. Dowdell, 227 Cal. App. 4th 1388, 174 Cal. Rptr. 3d 547 \(6th Dist. 2014\)](#).
- 4 Cal.—[People v. Dowdell, 227 Cal. App. 4th 1388, 174 Cal. Rptr. 3d 547 \(6th Dist. 2014\)](#).
- 5 Wis.—[Mulkovich v. State, 73 Wis. 2d 464, 243 N.W.2d 198 \(1976\)](#).
- 6 U.S.—[Carlson v. Jess, 507 F. Supp. 2d 968 \(E.D. Wis. 2007\)](#), judgment aff'd, [526 F.3d 1018 \(7th Cir. 2008\)](#).
- 7 U.S.—[U.S. v. Hughey, 147 F.3d 423 \(5th Cir. 1998\)](#) (rejected on other grounds by, [U.S. v. Dickerson, 370 F.3d 1330 \(11th Cir. 2004\)](#)).
Cal.—[People v. Leonard, 78 Cal. App. 4th 776, 93 Cal. Rptr. 2d 180 \(3d Dist. 2000\)](#); [People v. Cruz, 25 Cal. App. 3d Supp. 1, 101 Cal. Rptr. 711 \(App. Dep't Super. Ct. 1972\)](#).
Factors considered
Due process is not denied every defendant who is refused right to defend himself or herself by means of chosen retained counsel; in exercising its discretion, the court may recognize other factors, including orderly

and expeditious judicial administration if the defendant is unjustifiably dilatory or arbitrarily desires to substitute counsel at the time of trial.

Cal.—[People v. Leonard](#), 78 Cal. App. 4th 776, 93 Cal. Rptr. 2d 180 (3d Dist. 2000).

8 Conn.—[State v. Hernaiz](#), 140 Conn. App. 848, 60 A.3d 331 (2013), certification denied, 308 Conn. 928, 64 A.3d 121 (2013).

9 U.S.—[U.S. v. Bonventre](#), 720 F.3d 126 (2d Cir. 2013).

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16C C.J.S. Constitutional Law § 1684

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

F. Assistance of Counsel

§ 1684. Indigency or other inability to secure counsel

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 4788 to 4792, 4809

West's Key Number Digest, [Criminal Law](#) 🔑 1710 to 1715, 1766

The Sixth Amendment to the Federal Constitution, providing that in all criminal prosecutions, the accused shall enjoy the right to the assistance of counsel for his or her defense, is made obligatory on the states by the Fourteenth Amendment, and an indigent defendant in a criminal prosecution in a state court has the right to have counsel appointed for him or her at public expense.

The Sixth Amendment to the Federal Constitution providing that in all criminal prosecutions the accused shall enjoy the right to the assistance of counsel for his or her defense is made obligatory on the states by the Fourteenth Amendment,¹ and an indigent defendant in a criminal prosecution in a state court has the right to have counsel appointed for him or her² at public expense.³ There is no set specific financial guideline for the determination of indigency, as required to be entitled to counsel at public expense; it is clear, however, that a defendant does not have to be totally without means in order to be entitled to counsel at public expense.⁴

The Sixth and Fourteenth Amendments to the Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him or her the right to assistance of appointed counsel in his or her defense.⁵

Due process⁶ and the Fifth Amendment⁷ do not require the State to purchase for an indigent defendant all the assistance that his or her wealthier counterparts might buy, but rather only the basic tools.⁸ A court determines what services constitute "basic tools," which an indigent defendant is entitled to, by considering three factors: (1) the effect on the defendant's interest in the accuracy of trial if the requested service is not provided, (2) the burden on the government's interest if the service is provided, and (3) the probable value of the additional service and the risk of error in the proceeding if the service is not offered; importantly, these factors are all based upon a request by the defendant for additional services.⁹ The mere fact that a particular service might be of benefit to an indigent defendant does not mean that the service is required by due process; rather, due process requires only that the defendant not be denied an adequate opportunity to present his or her claims fairly within the adversary system.¹⁰

In felony cases,¹¹ in contrast to misdemeanor charges,¹² the Constitution requires that indigent defendants be offered appointed counsel unless that right is intelligently and competently waived.¹³ As a result, in misdemeanor cases where the court elects not to appoint counsel, it restricts its sentencing options accordingly.¹⁴ Then again, states may decide, based on their own Constitutions or public policy, that counsel should be available for all indigent defendants charged with misdemeanors.¹⁵ The duty of the State to provide counsel to a person accused who, because of indigency, could not afford a lawyer, turns on whether a deprivation of liberty may result from the proceeding, not upon the proceeding's characterization as either criminal or civil.¹⁶

The Fifth Amendment's guarantee of fundamental fairness entitles indigent defendants to a fair opportunity to present their defense at trial.¹⁷ It is a deprivation of due process of law to deny defendant the right to have counsel appointed to defend him or her when he or she is indigent¹⁸ or unable to employ counsel and unable to conduct his or her own defense,¹⁹ whether or not requested.²⁰

Although, where counsel is assigned to defend the accused, due process is denied by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case,²¹ there is no constitutionally proscribed time period,²² and a late appointment of counsel does not necessarily deny due process.²³

The subjective dissatisfaction of an indigent defendant with court-appointed counsel cannot be made the sole basis for demand for appointment of new counsel as a matter of constitutional right; in the event an indigent defendant is dissatisfied with court-appointed counsel, he or she has the right to ask for appointment of new counsel, stating the reasons for his or her dissatisfaction, and the court may then determine the propriety of appointment of new counsel.²⁴

Statutes providing for payment of fees to court-appointed attorneys in criminal cases in varying amounts depending on the nature of charges against defendant,²⁵ or statutes providing for indigent's liability for costs under the specified conditions,²⁶ have been held not to violate due process. Due process requires, however, that before a court can order a defendant to pay a reasonable sum to compensate the county or state for the services of court-appointed counsel, it must give the defendant notice that it is considering imposing the fee, and the defendant must be given the opportunity to present evidence regarding his or her ability to pay and any other relevant circumstances; the hearing must focus on the costs of representation, the defendant's financial circumstances, and the foreseeable ability of the defendant to pay.²⁷ In short, whenever a trial court attempts to enforce its imposition of a fee for a court-appointed attorney, the defendant has a due process right to be advised of this enforcement action and be given an opportunity to contest the enforcement on the basis of indigency.²⁸ A statute imposing an application fee upon defendants seeking appointed counsel does not violate an indigent defendant's rights under the Sixth and Fourteenth Amendments where the fee is only assessed after conviction and after a finding that the fee will not impose a manifest hardship on the defendant.²⁹ A statute prohibiting court clerks from filing claims while inmates have court costs and fees outstanding, however, violates the constitutional right against loss of liberty due to indigency.³⁰

Indigent defendant does not have Sixth Amendment or due process right to release of forfeited, government funds or other forfeited property in order to finance choice of counsel.³¹

CUMULATIVE SUPPLEMENT

Cases:

Remedy for misconduct of chemist at state laboratory, which affected thousands of drug convictions, would occur in three phases: in first phase, district attorneys would exercise their prosecutorial discretion and reduce number of relevant defendants by moving to vacate and dismiss with prejudice all drug cases district attorneys would not or could not re prosecute if new trial were ordered; in second phase, new, adequate notice would be provided to all relevant defendants whose cases had not been dismissed in phase one; in third phase, Committee for Public Counsel Services (CPCS) would assign counsel to all indigent relevant defendants who wished to explore possibility of moving to vacate their plea or for a new trial. [U.S. Const. Amend. 6](#). [Bridgeman v. District Attorney for Suffolk District](#), 476 Mass. 298, 67 N.E.3d 673 (2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 [§ 1680](#).
- 2 [U.S.—Gideon v. Wainwright](#), 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963); [U. S. ex rel. O'Brien v. Maroney](#), 423 F.2d 865 (3d Cir. 1970); [Mason v. State of Ariz.](#), 504 F.2d 1345 (9th Cir. 1974).
[Conn.—Consiglio v. Warden, State Prison](#), 153 Conn. 673, 220 A.2d 269 (1966).
[Fla.—Smith v. State](#), 198 So. 2d 641 (Fla. 1st DCA 1967).
[Ga.—Perry v. State](#), 120 Ga. App. 304, 170 S.E.2d 350 (1969).
[Haw.—State v. Kane](#), 52 Haw. 484, 479 P.2d 207 (1971).
[Idaho—Bement v. State](#), 91 Idaho 388, 422 P.2d 55 (1966).
[Ill.—People v. Dixon](#), 366 Ill. App. 3d 848, 304 Ill. Dec. 869, 853 N.E.2d 1235 (1st Dist. 2006).
[Kan.—Stahl v. Board of County Com'rs of Geary County](#), 198 Kan. 623, 426 P.2d 134 (1967).
[La.—State v. Garcia](#), 108 So. 3d 1 (La. 2012), cert. denied, 133 S. Ct. 2863, 186 L. Ed. 2d 926 (2013).
[Md.—State v. Renshaw](#), 276 Md. 259, 347 A.2d 219 (1975).
[Mont.—State v. Swan](#), 199 Mont. 459, 649 P.2d 1297 (1982).
[N.Y.—Miller v. Gordon](#), 58 A.D.2d 1027, 397 N.Y.S.2d 500 (4th Dep't 1977).
[Tex.—Malcom v. State](#), 628 S.W.2d 790 (Tex. Crim. App. 1982).
Basis for supplying counsel
Elementary principle that when a state brings its judicial power to bear on an indigent defendant, it must take steps to assure that defendant has a fair opportunity to present a defense, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as result of his or her poverty, defendant is denied an opportunity to participate meaningfully in a judicial proceeding in which his or her liberty is at stake.
[U.S.—Ake v. Oklahoma](#), 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).
[Idaho—State v. Olin](#), 103 Idaho 391, 648 P.2d 203 (1982).
[Ill.—In re T.W.](#), 402 Ill. App. 3d 981, 342 Ill. Dec. 234, 932 N.E.2d 125 (1st Dist. 2010).
[Mich.—People v. Carson](#), 19 Mich. App. 1, 172 N.W.2d 211 (1969).
[Mont.—City of Missoula v. Fogarty](#), 2013 MT 254, 371 Mont. 513, 309 P.3d 10 (2013).
[Wis.—State v. Campbell](#), 2006 WI 99, 294 Wis. 2d 100, 718 N.W.2d 649 (2006).
Court's discretion
It is within the trial court's discretion to determine whether counsel shall be appointed at public expense; the court does not, however, have discretion to deny counsel to an indigent defendant.
- 3

Ind.—Parish v. State, 989 N.E.2d 831 (Ind. Ct. App. 2013).

Ind.—Parish v. State, 989 N.E.2d 831 (Ind. Ct. App. 2013).

U.S.—Scott v. Illinois, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979); Wilson v. Estelle, 625 F.2d 1158 (5th Cir. 1980).

La.—In Interest of Howard, 382 So. 2d 194 (La. Ct. App. 2d Cir. 1980).

Tex.—Ex parte Jimenez, 364 S.W.3d 866 (Tex. Crim. App. 2012), cert. denied, 133 S. Ct. 834, 184 L. Ed. 2d 651 (2013).

U.S.—U.S. v. Solon, 596 F.3d 1206 (10th Cir. 2010).

U.S.—U.S. v. Solon, 596 F.3d 1206 (10th Cir. 2010).

Va.—Morva v. Com., 278 Va. 329, 683 S.E.2d 553 (2009).

U.S.—U.S. v. Solon, 596 F.3d 1206 (10th Cir. 2010).

Va.—Morva v. Com., 278 Va. 329, 683 S.E.2d 553 (2009).

U.S.—Nichols v. U.S., 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994); U.S. v. Peshlakai, 618 F. Supp. 2d 1295 (D.N.M. 2007).

Kan.—State v. Tims, 49 Kan. App. 2d 845, 317 P.3d 115 (2014), review granted, (Jan. 15, 2015).

Utah—State v. Von Ferguson, 2007 UT 1, 169 P.3d 423 (Utah 2007).

U.S.—Nichols v. U.S., 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994); U.S. v. Peshlakai, 618 F. Supp. 2d 1295 (D.N.M. 2007).

Tex.—Williams v. State, 252 S.W.3d 353 (Tex. Crim. App. 2008).

A.L.R. Library

Appealability of federal court order denying motion for appointment of counsel for indigent party, 67 A.L.R. Fed. 925.

Utah—State v. Von Ferguson, 2007 UT 1, 169 P.3d 423 (Utah 2007).

U.S.—Nichols v. U.S., 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994).

Traffic violations

Habeas corpus petitioner who was jailed pursuant to state statute for failure to pay fine previously assessed after he pled guilty to traffic violation was unconstitutionally deprived of his Sixth Amendment right to counsel when he was not informed that he had right to be represented by attorney and that if he was indigent, court would appoint attorney for him.

U.S.—Colson v. Joyce, 816 F.2d 29 (1st Cir. 1987).

Defendant in child support contempt proceeding is entitled to appointment of counsel.

Tex.—Ex parte Hamill, 718 S.W.2d 78 (Tex. App. Fort Worth 1986).

Tex.—Ex parte Hamill, 718 S.W.2d 78 (Tex. App. Fort Worth 1986).

U.S.—U.S. v. Solon, 596 F.3d 1206 (10th Cir. 2010).

U.S.—U. S. ex rel. Kohlfuss v. Reincke, 254 F. Supp. 440 (D. Conn. 1964).

Fla.—Walls v. State, 199 So. 2d 724 (Fla. 1967).

Ga.—Petetit v. State, 136 Ga. App. 931, 222 S.E.2d 640 (1975).

Haw.—State v. Mickle, 56 Haw. 23, 525 P.2d 1108 (1974).

Ill.—People v. Cook, 81 Ill. 2d 176, 40 Ill. Dec. 825, 407 N.E.2d 56 (1980).

Mich.—People v. Simpson, 35 Mich. App. 1, 192 N.W.2d 118 (1971); People v. Griffin, 22 Mich. App. 101, 177 N.W.2d 213 (1970).

Tex.—Ex parte King, 550 S.W.2d 691 (Tex. Crim. App. 1977).

U.S.—Cash v. Culver, 358 U.S. 633, 79 S. Ct. 432, 3 L. Ed. 2d 557 (1959); Mosley v. Dutton, 367 F.2d 913 (5th Cir. 1966).

Alaska—Gregory v. State, 550 P.2d 374 (Alaska 1976).

Cal.—Salas v. Cortez, 24 Cal. 3d 22, 154 Cal. Rptr. 529, 593 P.2d 226 (1979).

Ga.—Foote v. State, 136 Ga. App. 301, 220 S.E.2d 786 (1975).

Mo.—State v. Martin, 411 S.W.2d 215 (Mo. 1967).

W. Va.—State ex rel. Graves v. Daugherty, 164 W. Va. 726, 266 S.E.2d 142 (1980).

Alaska—Gregory v. State, 550 P.2d 374 (Alaska 1976).

N.C.—State v. Pickens, 20 N.C. App. 63, 200 S.E.2d 405 (1973).

Or.—State v. Edwards, 244 Or. 317, 417 P.2d 766 (1966).

Pa.—Com. ex rel. Robinson v. Maroney, 175 Pa. Super. 529, 107 A.2d 188 (1954).

- 21 Wash.—*Thorne v. Callahan*, 39 Wash. 2d 43, 234 P.2d 517 (1951).
 U.S.—*Avery v. State of Alabama*, 308 U.S. 444, 60 S. Ct. 321, 84 L. Ed. 377 (1940); *Schita v. King*, 133 F.2d 283 (C.C.A. 8th Cir. 1943); *Clark v. Lockhart*, 379 F. Supp. 1320 (E.D. Ark. 1974), judgment aff'd, 512 F.2d 235 (8th Cir. 1975).
 Ind.—*Sweet v. State*, 233 Ind. 160, 117 N.E.2d 745 (1954); *Collins v. State*, 163 Ind. App. 72, 321 N.E.2d 868 (1975).
 Kan.—*State v. Weigand*, 204 Kan. 666, 466 P.2d 331 (1970).
 Pa.—*Com. ex rel. Sheeler v. Burke*, 367 Pa. 152, 79 A.2d 654 (1951).
 As to adequacy and effectiveness of representation generally as affecting due process, see § 1686.
- 22 U.S.—*U.S. v. Sahley*, 526 F.2d 913 (5th Cir. 1976); *Grey v. Slayton*, 345 F. Supp. 1278 (W.D. Va. 1972).
 Me.—*State v. Smith*, 268 A.2d 625 (Me. 1970).
- 23 U.S.—*U.S. v. Bray*, 445 F.2d 178 (5th Cir. 1971); *Capler v. City of Greenville, Miss.*, 422 F.2d 299 (5th Cir. 1970); *Clark v. Lockhart*, 379 F. Supp. 1320 (E.D. Ark. 1974), judgment aff'd, 512 F.2d 235 (8th Cir. 1975).
 Mich.—*People v. Lorraine*, 34 Mich. App. 121, 190 N.W.2d 746 (1971).
 Pa.—*Com. ex rel. Foeman v. Maroney*, 420 Pa. 486, 218 A.2d 230 (1966).
 Tex.—*Solis v. State*, 718 S.W.2d 282 (Tex. Crim. App. 1986).
- 24 Iowa—*Roberts v. Bennett*, 258 Iowa 1101, 141 N.W.2d 628 (1966).
A.L.R. Library
 Indigent accused's right to choose particular counsel appointed to assist him, 66 A.L.R.3d 996.
- 25 Fla.—*Metropolitan Dade County v. Bridges*, 402 So. 2d 411 (Fla. 1981).
 Va.—*Webb v. Com.*, 32 Va. App. 337, 528 S.E.2d 138 (2000).
- 26 Cal.—*People v. Amor*, 12 Cal. 3d 20, 114 Cal. Rptr. 765, 523 P.2d 1173 (1974).
 Kan.—*State v. Keener*, 224 Kan. 100, 577 P.2d 1182 (1978).
 Va.—*Wicks v. City of Charlottesville*, 215 Va. 274, 208 S.E.2d 752 (1974).
 Wash.—*State ex rel. Brundage v. Eide*, 83 Wash. 2d 676, 521 P.2d 706 (1974).
- 27 Ill.—*People v. Campbell*, 377 Ill. Dec. 968, 2 N.E.3d 1249 (App. Ct. 4th Dist. 2013).
- 28 Mich.—*People v. Jackson*, 483 Mich. 271, 769 N.W.2d 630 (2009).
- 29 Kan.—*State v. Casady*, 40 Kan. App. 2d 335, 191 P.3d 1130 (2008), aff'd, 289 Kan. 150, 210 P.3d 113 (2009).
- 30 U.S.—*Clifton v. Carpenter*, 775 F.3d 760 (6th Cir. 2014).
- 31 U.S.—*U.S. v. Friedman*, 849 F.2d 1488 (D.C. Cir. 1988).
 Ohio—*State v. Thrower*, 85 Ohio App. 3d 729, 621 N.E.2d 456 (9th Dist. Summit County 1993).

16C C.J.S. Constitutional Law § 1685

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

F. Assistance of Counsel

§ 1685. Stage of proceedings

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4800 to 4816

Due process requires that the accused be given assistance of counsel at every critical stage of a criminal proceeding.

Due process requires that the accused be given assistance of counsel at every critical stage of a criminal proceeding,¹ and a "critical stage" is one in which the accused's substantive rights may be affected.² Prior to the initiation of adversary criminal proceedings, a suspect's right to consult with an attorney is governed by the Due Process Clause of the Fifth Amendment, in order to ensure protection of the right against compulsory self-incrimination,³ but a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him or her,⁴ whether by way of initial hearing,⁵ formal charge, indictment, information, or arraignment.⁶ A preliminary hearing, even if not a required step in a state criminal prosecution, is a critical stage of the State's criminal process at which the accused is entitled to the aid of counsel.⁷ However, whether due process is denied because of the absence of counsel at such a hearing depends on whether defendant is prejudiced thereby.⁸ Furthermore, due process does not require that appointment of counsel be made within a specific amount of time prior to the preliminary hearing.⁹

Arraignment is a critical stage in the criminal case, and the absence or lack of counsel at such time is a violation of the defendant's right to due process,¹⁰ provided counsel's absence affects his or her defense,¹¹ although there is authority holding that arraignment is not a critical stage of the proceeding for purposes of due process when conducted without the presence of counsel.¹²

The fixing of bail is a critical stage in a criminal proceeding, triggering the right to counsel.¹³

Preindictment lineup.

Generally, the presence of counsel at a preindictment lineup is not a due process requirement.¹⁴ The presence of counsel is required, however, where the proceeding loses its character as a pretrial investigative procedure and becomes a critical stage of the proceeding,¹⁵ as where a lineup is conducted after the accused has been indicted.¹⁶

Showup or confrontation; photographic identification.

The presence of counsel at a showup or confrontation¹⁷ or at a photographic identification¹⁸ is not an essential requirement of due process, so long as the showup or confrontation or the identification proceedings were not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. However, the accused is entitled to counsel at an arraignment showup and his or her identification by a witness at that showup in the absence of a counsel violates the accused's due process rights.¹⁹

The identification of a suspect by the victim at a pretrial confrontation does not necessarily conform to due process requirements merely because the suspect's attorney was present, though the presence of an attorney is a highly relevant factor in determining such conformity.²⁰

Sentencing.

A defendant has a due process right to legal representation at a sentencing hearing.²¹ Likewise, resentencing is a critical stage of a criminal proceeding in which the full panoply of due process considerations attach, including the appointment of counsel.²² Any replaying of an audiotape of a defendant's statement during police questioning by the jury during deliberations at the penalty phase, however, is not a critical stage of criminal proceedings, such as would entitle a defendant to be present with counsel during the replaying.²³

Appeal and habeas corpus proceedings.

The Federal Constitution imposes on the states no obligation to provide appellate review of criminal convictions, and a state generally need not appoint counsel to aid an indigent defendant in a discretionary appeal to the state's high court, or in petitioning for review in the United States Supreme Court,²⁴ but where a State provides for first appeals²⁵ as of right,²⁶ the State must appoint counsel to represent an indigent defendant. In such a situation, the Due Process and Equal Protection Clauses require the appointment of counsel for indigent defendants, convicted on pleas of guilty or nolo contendere, who seek access to first-tier review even though such review is discretionary under state law.²⁷ This is so because the court of appeals sits as an error-correcting instance and thus looks to the merits of claims made in the defendant's application for leave to appeal, and indigent defendants pursuing first-tier review in the court of appeals are generally ill-equipped to represent themselves.²⁸

The accused is not denied due process of law by the failure of counsel to file a timely petition for appellate review²⁹ or to perfect an appeal.³⁰ However, gross neglect by counsel is not to be tolerated,³¹ and due process is denied by the failure to grant a belated appeal, where the appeal period expired without action and retained counsel failed to give defendant notice that he or she did not intend to file an appeal,³² or where counsel files a notice of appeal but fails to serve a filed notice of appeal on opposing counsel as required.³³

Due process is not violated when appointed counsel makes an affirmative determination that there is no basis for appeal,³⁴ but it is denied if he or she fails to take an appeal although informed of an indigent defendant's desire to pursue one³⁵ or where counsel is unwilling to present particular arguments requested by the defendant.³⁶

A state court rule regulating the scope of a court appointed appellate counsel's duty to an indigent client after conscientiously determining that the indigent's appeal is wholly frivolous was held to be constitutional.³⁷

The federal statute³⁸ pertaining to counsel for financially unable defendants entitles indigent defendants to the appointment of counsel in capital cases, including habeas corpus proceedings,³⁹ but a defendant generally has no federal constitutional right to counsel when attacking, in postconviction proceedings, a conviction that has become final upon exhaustion of the appellate process.⁴⁰

Breathalyzer test.

The right to consult with an attorney before deciding whether to submit to a breathalyzer test requested by the police officer under a state implied consent law is not guaranteed by the Due Process Clause of the Fourteenth Amendment.⁴¹

However, it has also been held that, under the Due Process Clause of the Fourteenth Amendment, an individual under detention for drunk driving must, on request, be permitted a reasonable opportunity to communicate with counsel before submitting to a chemical sobriety test, as long as such attempted communication will not substantially interfere with the timely and efficacious administration of the test.⁴²

Probation hearing.

Due process does not require that a defendant be advised of, or receive counsel, before requesting an extension of probation and waiving a hearing,⁴³ but due process does require that the State provide a probationer with counsel when a violation-of-probation hearing follows an acquittal after a criminal trial for the same alleged conduct.⁴⁴

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Footnotes

- 1 U.S.—*Carter v. People of State of Illinois*, 329 U.S. 173, 67 S. Ct. 216, 91 L. Ed. 172 (1946); U. S. ex rel. *Hart v. Davenport*, 478 F.2d 203 (3d Cir. 1973); *Phillips v. Smith*, 300 F. Supp. 130 (S.D. Ga. 1969); U. S. ex rel. *Wright v. Myers*, 265 F. Supp. 483 (E.D. Pa. 1967).
Alaska—*Blue v. State*, 558 P.2d 636 (Alaska 1977).
Cal.—*People v. Jackson*, 250 Cal. App. 2d 851, 58 Cal. Rptr. 776 (2d Dist. 1967).
Conn.—*Gonzalez v. Commissioner of Correction*, 145 Conn. App. 16, 75 A.3d 705 (2013), certification denied, 310 Conn. 932, 78 A.3d 858 (2013).
Haw.—*Reponte v. State*, 57 Haw. 354, 556 P.2d 577 (1976).

- Me.—Green v. State, 247 A.2d 117 (Me. 1968).
- Md.—Utt v. Warden, Baltimore City Jail, 48 Md. App. 486, 427 A.2d 1092 (1981), judgment aff'd, 293 Md. 271, 443 A.2d 582 (1982).
- Mo.—McLallen v. State, 543 S.W.2d 813 (Mo. Ct. App. 1976).
- Nev.—Kaeser v. State, 96 Nev. 955, 620 P.2d 872 (1980).
- Pa.—Com. v. Wright, 599 Pa. 270, 961 A.2d 119 (2008).
- W. Va.—State ex rel. Riffle v. Thorn, 153 W. Va. 76, 168 S.E.2d 810 (1969).
- 2 Pa.—Com. v. Wright, 599 Pa. 270, 961 A.2d 119 (2008).
- 3 Ind.—Sweeney v. State, 886 N.E.2d 1 (Ind. Ct. App. 2008).
- 4 U.S.—Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); Kirby v. Illinois, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972); Cobb v. Aytch, 643 F.2d 946 (3d Cir. 1981); U.S. v. Miramon, 470 F.2d 1362 (9th Cir. 1972).
- Cal.—People v. Boyd, 86 Cal. App. 3d 54, 150 Cal. Rptr. 34 (1st Dist. 1978).
- Ind.—Winston v. State, 263 Ind. 8, 323 N.E.2d 228 (1975).
- N.J.—State v. Hayes, 205 N.J. 522, 16 A.3d 1028 (2011).
- N.Y.—People v. Colon, 62 A.D.2d 398, 405 N.Y.S.2d 735 (2d Dep't 1978).
- N.C.—State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).
- Okla.—Chandler v. State, 1972 OK CR 227, 501 P.2d 512 (Okla. Crim. App. 1972).
- Wis.—Jordan v. State, 93 Wis. 2d 449, 287 N.W.2d 509 (1980).
- 5 Md.—DeWolfe v. Richmond, 434 Md. 444, 76 A.3d 1019 (2013).
- 6 U.S.—Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977).
- Cal.—People v. Boyd, 86 Cal. App. 3d 54, 150 Cal. Rptr. 34 (1st Dist. 1978).
- Mont.—State v. Reavley, 2003 MT 298, 318 Mont. 150, 79 P.3d 270 (2003).
- Okla.—Chandler v. State, 1972 OK CR 227, 501 P.2d 512 (Okla. Crim. App. 1972).
- Wis.—Jordan v. State, 93 Wis. 2d 449, 287 N.W.2d 509 (1980).
- 7 U.S.—Coleman v. Alabama, 399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970).
- N.C.—State v. Cradle, 281 N.C. 198, 188 S.E.2d 296 (1972).
- 8 U.S.—Hall v. U.S., 418 F.2d 498 (3d Cir. 1969).
- Ariz.—State v. Burrell, 102 Ariz. 136, 426 P.2d 633 (1967).
- Fla.—Harris v. State, 208 So. 2d 108 (Fla. 1st DCA 1968).
- Ill.—People v. Bernatowicz, 35 Ill. 2d 192, 220 N.E.2d 745 (1966).
- Ky.—Turner v. Com., 404 S.W.2d 13 (Ky. 1966).
- Mich.—People v. Sharp, 9 Mich. App. 34, 155 N.W.2d 719 (1967).
- Mo.—State v. Turley, 452 S.W.2d 65 (Mo. 1970).
- 9 Pa.—Com. v. Wright, 599 Pa. 270, 961 A.2d 119 (2008).
- 10 U.S.—Phillips v. Smith, 300 F. Supp. 130 (S.D. Ga. 1969).
- 11 Pa.—Com. v. Jones, 452 Pa. 569, 308 A.2d 598 (1973).
- 12 Ky.—Collins v. Com., 433 S.W.2d 663 (Ky. 1968).
- 13 Mass.—Lavalley v. Justices In Hampden Superior Court, 442 Mass. 228, 812 N.E.2d 895 (2004).
- N.J.—State v. Fann, 239 N.J. Super. 507, 571 A.2d 1023 (Law Div. 1990).
- 14 U.S.—McGee v. Estelle, 625 F.2d 1206 (5th Cir. 1980).
- Ala.—Brinks v. State, 44 Ala. App. 601, 217 So. 2d 813 (1968).
- Ariz.—State v. Schmidgall, 21 Ariz. App. 68, 515 P.2d 609 (Div. 1 1973).
- Cal.—People v. Farley, 267 Cal. App. 2d 214, 72 Cal. Rptr. 855 (2d Dist. 1968).
- Ill.—People v. Bolden, 197 Ill. 2d 166, 258 Ill. Dec. 538, 756 N.E.2d 812 (2001).
- La.—State v. Russell, 416 So. 2d 1283 (La. 1982); State v. Fields, 342 So. 2d 624, 87 A.L.R.3d 229 (La. 1977).
- Md.—Jackson v. State, 17 Md. App. 167, 300 A.2d 430 (1973).
- N.C.—State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).
- 15 N.C.—State v. Wright, 274 N.C. 84, 161 S.E.2d 581 (1968).
- 16 Alaska—Blue v. State, 558 P.2d 636 (Alaska 1977).
- 17 U.S.—U.S. v. Hines, 455 F.2d 1317 (D.C. Cir. 1971).

Alaska—*Vessell v. State*, 624 P.2d 275 (Alaska 1981).

La.—*State v. Lewis*, 255 La. 134, 229 So. 2d 726 (1969).

Neb.—*State v. Sears*, 182 Neb. 384, 155 N.W.2d 332 (1967).

Tex.—*Ellsworth v. State*, 447 S.W.2d 170 (Tex. Crim. App. 1969).

18 U.S.—*Richmond v. U.S.*, 405 U.S. 974, 92 S. Ct. 1206, 31 L. Ed. 2d 247 (1972); *Smith v. U.S.*, 405 U.S. 974, 92 S. Ct. 1206, 31 L. Ed. 2d 247 (1972); *Mikel v. Thieret*, 887 F.2d 733 (7th Cir. 1989); *U.S. v. Long*, 449 F.2d 288 (8th Cir. 1971).

Utah—*State v. Jenkins*, 523 P.2d 1232 (Utah 1974).

19 U.S.—*Solomon v. Smith*, 487 F. Supp. 1134 (S.D. N.Y. 1980), judgment aff'd, 645 F.2d 1179 (2d Cir. 1981).

20 Md.—*Nance v. State*, 7 Md. App. 433, 256 A.2d 377 (1969).

21 Fla.—*Frison v. State*, 76 So. 3d 1103 (Fla. 5th DCA 2011).

22 Fla.—*Frison v. State*, 76 So. 3d 1103 (Fla. 5th DCA 2011).

23 Ark.—*Anderson v. State*, 367 Ark. 536, 242 S.W.3d 229 (2006).

24 U.S.—*Halbert v. Michigan*, 545 U.S. 605, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005).

Discretionary appeals subsequent to a first appeal

Counsel for an indigent for discretionary appeals subsequent to a first appeal as of right are not required to be provided.

U.S.—*Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Ross v. Moffitt*, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

As to appointment of counsel due to indigency, generally, see § 1684.

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Determination of indigency entitling accused in state criminal case to appointment of counsel on appeal, 26 A.L.R.5th 765.

25 U.S.—*Halbert v. Michigan*, 545 U.S. 605, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005); *U. S. ex rel. Pennington v. Pate*, 409 F.2d 757 (7th Cir. 1969).

Ala.—*Reese v. State*, 339 So. 2d 1107 (Ala. Crim. App. 1976).

Tex.—*Ayala v. State*, 633 S.W.2d 526 (Tex. Crim. App. 1982).

26 U.S.—*Halbert v. Michigan*, 545 U.S. 605, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005); *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Moormann v. Ryan*, 628 F.3d 1102 (9th Cir. 2010); *Biggles v. Brewer*, 384 F. Supp. 1 (S.D. Iowa 1974).

Fla.—*McDaniel v. State*, 219 So. 2d 421 (Fla. 1969).

Minn.—*State ex rel. Daniels v. Tahash*, 273 Minn. 286, 141 N.W.2d 390 (1966).

Or.—*Shipman v. Gladden*, 253 Or. 192, 453 P.2d 921 (1969).

Tex.—*Ayala v. State*, 633 S.W.2d 526 (Tex. Crim. App. 1982).

27 U.S.—*Halbert v. Michigan*, 545 U.S. 605, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005).

Waiver via plea

An indigent defendant who, following a plea of nolo contendere, sought access to discretionary first-tier review in the Michigan Court of Appeals, could not have waived, via his plea, his due process and equal protection guarantees of appointed counsel for application for leave to appeal; at the time of the plea, state law did not recognize the right to appointed appellate counsel for defendants convicted on their pleas, and the trial court did not inform the defendant simply and directly that in his case there would be no access to appointed counsel.

U.S.—*Halbert v. Michigan*, 545 U.S. 605, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005).

28 U.S.—*Halbert v. Michigan*, 545 U.S. 605, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005).

29 U.S.—*Wainwright v. Torna*, 455 U.S. 586, 102 S. Ct. 1300, 71 L. Ed. 2d 475 (1982).

30 U.S.—*Plaskett v. Page*, 439 F.2d 770 (10th Cir. 1971); *Marsh v. U.S.*, 435 F. Supp. 426 (W.D. Okla. 1976).

31 Or.—*Shipman v. Gladden*, 253 Or. 192, 453 P.2d 921 (1969).

32 U.S.—*Boyd v. Cowan*, 519 F.2d 182 (6th Cir. 1975).

33 U.S.—*Blanchard v. Brewer*, 429 F.2d 89 (8th Cir. 1970).

34 Ga.—*Blackmon v. Smith*, 226 Ga. 849, 178 S.E.2d 176 (1970).

35 U.S.—*Byrd v. Smith*, 407 F.2d 363 (5th Cir. 1969); *Davis v. Wilson*, 278 F. Supp. 852 (C.D. Cal. 1968), judgment aff'd, 414 F.2d 1364 (9th Cir. 1969); *Moye v. State of Ga.*, 330 F. Supp. 290 (N.D. Ga. 1971).

N.Y.—*People v. Montgomery*, 24 N.Y.2d 130, 299 N.Y.S.2d 156, 247 N.E.2d 130 (1969).

- 36 U.S.—*Gallegos v. Turner*, 256 F. Supp. 670 (D. Utah 1966), judgment aff'd, 386 F.2d 440 (10th Cir. 1967).
37 **Requiring basis for conclusion that appeal is frivolous**
U.S.—*McCoy v. Court of Appeals of Wisconsin*, Dist. 1, 486 U.S. 429, 108 S. Ct. 1895, 100 L. Ed. 2d 440 (1988).
38 18 U.S.C.A. § 3599.
39 U.S.—*Christeson v. Roper*, 135 S. Ct. 891, 190 L. Ed. 2d 763 (2015).
40 U.S.—*Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987).
Death row inmates
Neither Eighth Amendment nor Due Process Clause requires states to appoint counsel for indigent death row inmates seeking state postconviction relief.
U.S.—*Murray v. Giarratano*, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989).
41 R.I.—*Dunn v. Petit*, 120 R.I. 486, 388 A.2d 809 (1978).
Tex.—*McCambridge v. State*, 778 S.W.2d 70 (Tex. Crim. App. 1989).
42 Md.—*Sites v. State*, 300 Md. 702, 481 A.2d 192 (1984) (rejected by, *McCambridge v. State*, 778 S.W.2d 70 (Tex. Crim. App. 1989)).
43 Colo.—*People v. Hotle*, 216 P.3d 68 (Colo. App. 2008).
44 Del.—*Cruz v. State*, 990 A.2d 409 (Del. 2010).

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16C C.J.S. Constitutional Law § 1686

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

F. Assistance of Counsel

§ 1686. Adequacy and effectiveness of representation

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4813 to 4815

The Sixth Amendment of the Federal Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, guarantees to every defendant in a criminal proceeding the effective assistance of counsel.

The Sixth Amendment of the Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, guarantees to every defendant in a criminal proceeding the effective assistance of counsel.¹ It is a fundamental right² and bedrock principle,³ and therefore, it is a deprivation of due process of law to deny defendant his or her right to the effective assistance of counsel.⁴ Due process requires that defendant's effective representation by counsel include thorough investigation and preparation.⁵ In a criminal prosecution, the defendant's due process right to the assistance of counsel includes the guaranty that such assistance be adequate,⁶ competent, and effective,⁷ whether the attorney is one of defendant's choosing⁸ or court-appointed,⁹ as in a case of an indigent defendant.¹⁰

Constitutionally ineffective assistance of counsel in a state court may be based upon either the Due Process Clause of the Fourteenth Amendment standing alone, or the Right to Counsel Clause of the Sixth Amendment as incorporated into the Fourteenth Amendment due process.¹¹ With respect to a general due process claim, constitutionally ineffective assistance of

counsel, whether counsel is retained or appointed, occurs when the whole proceeding is fundamentally unfair; state action exists from the fact that the State conducts the proceedings.¹²

As to a specific Sixth Amendment claim, the constitutional requirement is reasonably effective assistance of counsel, and under such claim, a constitutional violation occurs when retained counsel's conduct is less than reasonably effective but not necessarily so grossly deficient as to render the proceedings fundamentally unfair; state action in retained counsel's conduct is shown by demonstrating that a state official who could have remedied the conduct so as to accord justice to the accused either knew or should have known of the conduct.¹³

Appeal.

A criminal defendant's right to the effective assistance of counsel extends through the first appeal of right and is guaranteed by the Sixth, Fourteenth,¹⁴ and Fifth¹⁵ Amendments to the United States Constitution. An attorney renders effective assistance of counsel with regard to a decision whether to appeal when he or she advises the defendant of his or her appellate rights;¹⁶ conversely, a failure on the part of counsel to inform his or her client of the right to appeal violates the defendant's due process right to the effective assistance of counsel¹⁷ although it has been held that the failure to do so does not, in and of itself, constitute incompetency on the part of counsel sufficient to constitute a denial of due process.¹⁸ Negligent failure of counsel to commence or perfect an appeal¹⁹ or to file a timely notice of appeal after he or she has been requested or agreed to do so²⁰ may constitute a due process denial of effective assistance of counsel, but a failure to appeal does not, ipso facto, raise an issue as to the denial of due process.²¹ Furthermore, appellate counsel does not have a duty to raise every nonfrivolous issue requested by the defendant.²² In fact, even appellate counsel's reference to an indigent defendant's appellate claims as "frivolous" will not necessarily violate the indigent defendant's due process and equal protection rights to appellate counsel.²³

Denial of funds to conduct opinion poll.

The defendant is not denied due process as to effective assistance of counsel because the trial judge denies his or her request for funds to conduct a public opinion poll in certain counties for the purpose of selecting a transferee county.²⁴

Government interference with defendant's relationship with attorney.

Government interference with defendant's relationship with his or her attorney may render counsel's assistance so ineffective as to violate defendant's Sixth Amendment right to counsel²⁵ and Fifth Amendment right to due process of law,²⁶ but not all police action which arguably could be called an interference with the attorney-client relationship is violative of those rights.²⁷

Public defender.

Representation by the public defender's office does not ipso facto deny due process,²⁸ and the defendant is not denied due process because a public defender is not furnished where he or she is adequately represented by appointed counsel.²⁹

CUMULATIVE SUPPLEMENT

Cases:

Defense counsel's error, if any, in being absent from hearing in which trial court allowed state's amendment to criminal information, which originally charged defendant with Class C felony battery, to include a habitual offender enhancement, was harmless; counsel could have objected to the inclusion of the habitual offender enhancement at any time up to and including trial, and thus any waiver of defendant's challenge on appeal to the habitual amendment was not attributable solely to counsel's absence. *U.S. Const. Amend. 6. Barnett v. State*, 83 N.E.3d 93 (Ind. Ct. App. 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); *Clark v. Blackburn*, 619 F.2d 431 (5th Cir. 1980).
Conn.—*Gonzalez v. Commissioner of Correction*, 145 Conn. App. 16, 75 A.3d 705 (2013), certification denied, 310 Conn. 932, 78 A.3d 858 (2013).
Ill.—*People v. Taylor*, 237 Ill. 2d 356, 341 Ill. Dec. 445, 930 N.E.2d 959 (2010); *People v. Good*, 68 Ill. App. 3d 333, 24 Ill. Dec. 770, 385 N.E.2d 911 (5th Dist. 1979).
Mass.—*Com. v. Davis*, 376 Mass. 777, 384 N.E.2d 181 (1978).
N.J.—*State v. Melvins*, 155 N.J. Super. 316, 382 A.2d 925 (App. Div. 1978).
Wis.—*State v. Balliette*, 2011 WI 79, 336 Wis. 2d 358, 805 N.W.2d 334 (2011).
A.L.R. Library
Claims of Ineffective Assistance of Counsel in Death Penalty Proceedings—United States Supreme Court Cases, 31 A.L.R. Fed. 2d 1.
- 2 N.Y.—*People v. Clarke*, 66 A.D.3d 694, 886 N.Y.S.2d 753 (2d Dep't 2009).
- 3 U.S.—*Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012).
- 4 U.S.—*Reece v. State of Ga.*, 350 U.S. 85, 76 S. Ct. 167, 100 L. Ed. 77 (1955); *O'Brien v. Lindsey*, 204 F.2d 359 (1st Cir. 1953); *Capler v. City of Greenville, Miss.*, 298 F. Supp. 295 (N.D. Miss. 1969), judgment aff'd, 422 F.2d 299 (5th Cir. 1970).
Mo.—*Trimble v. State*, 593 S.W.2d 542 (Mo. 1980).
S.C.—*Ross v. State*, 250 S.C. 442, 158 S.E.2d 647 (1967).
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Adequacy of defense counsel's representation of criminal client—issues of incompetency, 70 A.L.R.5th 1.
Adequacy of defense counsel's representation of criminal client regarding prior convictions, 14 A.L.R.4th 227.
Adequacy of defense counsel's representation of criminal client regarding hypnosis and truth tests, 9 A.L.R.4th 354.
Adequacy of defense counsel's representation of criminal client regarding confessions and related matters, 7 A.L.R.4th 180.
- 5 U.S.—*McGarrity v. Beto*, 335 F. Supp. 1186 (S.D. Tex. 1971), order aff'd, 452 F.2d 1206 (5th Cir. 1971).
Cal.—*People v. Corona*, 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1st Dist. 1978).
W. Va.—*State ex rel. Rogers v. Casey*, 166 W. Va. 179, 273 S.E.2d 356 (1980).
- 6 Conn.—*Gonzalez v. Commissioner of Correction*, 145 Conn. App. 16, 75 A.3d 705 (2013), certification denied, 310 Conn. 932, 78 A.3d 858 (2013).
- 7 U.S.—*Reece v. State of Ga.*, 350 U.S. 85, 76 S. Ct. 167, 100 L. Ed. 77 (1955); *Castillo v. Estelle*, 504 F.2d 1243 (5th Cir. 1974); *Galloway v. Stephenson*, 510 F. Supp. 840 (M.D. N.C. 1981).
Cal.—*People v. Corona*, 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1st Dist. 1978).
Ill.—*People v. Murphy*, 72 Ill. 2d 421, 21 Ill. Dec. 350, 381 N.E.2d 677 (1978); *People v. Williams*, 95 Ill. App. 2d 421, 237 N.E.2d 740 (1st Dist. 1968).
S.C.—*Rogers v. State*, 261 S.C. 288, 199 S.E.2d 761 (1973).
- 8 U.S.—*Fitzgerald v. Beto*, 479 F.2d 420 (5th Cir. 1973), on reh'g, 505 F.2d 1334 (5th Cir. 1974).
- 9 U.S.—*Fitzgerald v. Beto*, 479 F.2d 420 (5th Cir. 1973), on reh'g, 505 F.2d 1334 (5th Cir. 1974).

- Iowa—*In re C.L.C. Jr.*, 798 N.W.2d 329 (Iowa Ct. App. 2011).
- 10 Fla.—*Dixon v. State*, 287 So. 2d 698 (Fla. 1st DCA 1973).
- Iowa—*State v. Williams*, 207 N.W.2d 98 (Iowa 1973).
- Md.—*State v. Renshaw*, 276 Md. 259, 347 A.2d 219 (1975).
- As to providing expert or investigative assistance to indigents as part of due process, see § 1708.
- 11 U.S.—*Ogle v. Estelle*, 641 F.2d 1122 (5th Cir. 1981).
- A.L.R. Library**
- Comment Note: Ineffective Assistance of Counsel in Removal Proceedings—Particular Omissions or Failures, 60 A.L.R. Fed. 2d 59.
- Comment Note: Ineffective Assistance of Counsel in Removal Proceedings—Particular Acts, 59 A.L.R. Fed. 2d 151.
- Comment Note: Ineffective Assistance of Counsel in Removal Proceedings—Legal Bases of Entitlement to Representation and Requisites to Establish Prima Facie Case of Ineffectiveness, 58 A.L.R. Fed. 2d 363.
- 12 U.S.—*Ogle v. Estelle*, 641 F.2d 1122 (5th Cir. 1981); *Passmore v. Estelle*, 607 F.2d 662 (5th Cir. 1979).
- Ga.—*Harrell v. State*, 139 Ga. App. 556, 228 S.E.2d 723 (1976).
- 13 U.S.—*Ogle v. Estelle*, 641 F.2d 1122 (5th Cir. 1981); *Passmore v. Estelle*, 607 F.2d 662 (5th Cir. 1979).
- 14 U.S.—*Honken v. U.S.*, 42 F. Supp. 3d 937 (N.D. Iowa 2013).
- Conn.—*Perez v. Commissioner of Correction*, 150 Conn. App. 371, 90 A.3d 374 (2014), certification denied, 312 Conn. 919, 94 A.3d 640 (2014).
- As to due process right to counsel on an appeal, see § 1685.
- 15 U.S.—*U.S. v. Schwartz*, 925 F. Supp. 2d 663 (E.D. Pa. 2013).
- 16 U.S.—*Norris v. Wainwright*, 588 F.2d 130 (5th Cir. 1979).
- A.L.R. Library**
- Adequacy of defense counsel's representation of criminal client regarding appellate and post-conviction remedies, 15 A.L.R.4th 582.
- 17 U.S.—*U. S. ex rel. Thurmond v. Mancusi*, 275 F. Supp. 508 (E.D. N.Y. 1967).
- 18 Fla.—*Nichols v. Wainwright*, 243 So. 2d 430 (Fla. 2d DCA 1971).
- 19 U.S.—*Riser v. Craven*, 501 F.2d 381 (9th Cir. 1974).
- S.D.—*Loop v. Solem*, 398 N.W.2d 140 (S.D. 1986).
- 20 Or.—*Shipman v. Gladden*, 253 Or. 192, 453 P.2d 921 (1969).
- 21 Ill.—*People v. Baze*, 43 Ill. 2d 298, 253 N.E.2d 392 (1969); *People v. Spencer*, 7 Ill. App. 3d 828, 288 N.E.2d 682 (1st Dist. 1972).
- Notice of neglect**
- The dismissal of a defendant's appeal for failing to pursue the appeal for 16 years did not violate his Fourteenth Amendment due process rights, even though the defendant's counsel was ineffective in failing to perfect the appeal that he was hired to pursue, where counsel was admonished by the Disciplinary Committee for neglecting the defendant's case nine years prior to the defendant finally filing the appeal, this gave the defendant notice of the neglect, yet the defendant did not seek new counsel.
- N.Y.—*People v. Perez*, 23 N.Y.3d 89, 989 N.Y.S.2d 418, 12 N.E.3d 416 (2014), cert. denied, 135 S. Ct. 229, 190 L. Ed. 2d 173 (2014) and cert. denied, 135 S. Ct. 273, 190 L. Ed. 2d 201 (2014).
- 22 U.S.—*Rowland v. Chappell*, 902 F. Supp. 2d 1296 (N.D. Cal. 2012).
- 23 Miss.—*Lindsey v. State*, 939 So. 2d 743 (Miss. 2005).
- 24 Iowa—*State v. Williams*, 285 N.W.2d 248 (Iowa 1979).
- 25 U.S.—*U.S. v. Irwin*, 612 F.2d 1182 (9th Cir. 1980).
- R.I.—*State v. Laurence*, 848 A.2d 238 (R.I. 2004).
- 26 U.S.—*U.S. v. Stringer*, 535 F.3d 929 (9th Cir. 2008).
- R.I.—*State v. Laurence*, 848 A.2d 238 (R.I. 2004).
- 27 U.S.—*U.S. v. Irwin*, 612 F.2d 1182 (9th Cir. 1980).
- R.I.—*State v. Laurence*, 848 A.2d 238 (R.I. 2004).
- 28 Cal.—*People v. Miller*, 7 Cal. 3d 562, 102 Cal. Rptr. 841, 498 P.2d 1089 (1972).
- 29 Ark.—*McDonald v. State*, 249 Ark. 506, 459 S.W.2d 806 (1970).

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

F. Assistance of Counsel

§ 1687. Adequacy and effectiveness of representation —Tests and circumstances determining effectiveness

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 4813 to 4815

There is no isolated constitutional test or a particular factor by which to determine whether a defendant's due process right to effective assistance of counsel has been violated; rather, whether the defendant has been denied due process depends on the particular circumstances of the case.

There is no isolated constitutional test¹ or a particular factor² by which to determine whether defendant's due process right to effective assistance of counsel has been violated; rather, whether the accused has been denied due process depends on the particular circumstances of the case.³ To warrant a finding of the deprivation of due process because of the ineffective assistance of counsel, the totality of circumstances must include an affirmative actual basis demonstrating counsel's inadequacy of representation.⁴ Simply because defendant's attorney does not meet defendant's standards of effectiveness does not constitute a denial of due process.⁵

Effective counsel required by due process is not infallible,⁶ perfect,⁷ or errorless⁸ but, rather, counsel reasonably likely to render, and rendering, reasonably effective⁹ or reasonably competent¹⁰ assistance. The test of reasonable competence cannot be so weak, however, as to deny a defendant adequate due process.¹¹ The services of counsel meet the requirements of the Due

Process Clause of the Fourteenth Amendment where counsel is a member in good standing of a bar¹² gives defendant his or her undivided loyalty¹³ and serves defendant in good faith to the best of his or her ability, and counsel's service is of such character as to preserve the essential integrity of the proceedings.¹⁴

Although the Due Process Clause does not guarantee a meaningful relationship between a client and his or her appointed counsel,¹⁵ mere formal representation of the defendant by counsel does not satisfy the requirements of due process,¹⁶ and the constitutional requirement of due process can only be attained where counsel acts in the role of an active advocate in behalf of the client, as opposed to that of *amicus curiae*.¹⁷ What is more, due process is not synonymous with total inaction and noninvolvement; some actions undertaken by the defense may result in a benefit to the prosecution, yet due process is not violated.¹⁸

An attorney, whether retained or appointed, laboring under an actual conflict of interest in his or her representation of the defendant fails to accord effective assistance of counsel as guaranteed by the Due Process Clause,¹⁹ as where the attorney represents codefendants whose interests are in conflict,²⁰ provided defendant's cause is prejudiced thereby.²¹ Furthermore, a conflict of interest between a benefactor and the recipient of legal services can lead to the violation of a defendant's due process rights.²² There is no denial of due process, however, where the conflict of interest is potential and not actual,²³ and the defendant proffers no evidence that the conflict undermined the trial's fundamental fairness.²⁴

What is required to meet the dictates of due process is that representation by counsel not be so lacking in competence that it becomes the duty of the court or prosecution to observe and correct the deficiencies.²⁵ In order to substantiate a claim of ineffective assistance of counsel, defendant must establish actual incompetence of counsel, as reflected in the manner of carrying out his or her duties as a trial attorney, and subsequent prejudice therefrom without which the outcome would probably have been different.²⁶ The harmless error doctrine has a significant role in the due process concept and may not be automatically ruled out in cases where defendant is considered to have been denied effective assistance of counsel.²⁷ So where counsel's act, or failure to act, is harmless due process is not denied.²⁸

Mere mistakes or possible errors in judgments²⁹ or trial strategy³⁰ of trial counsel considered with the benefit of hindsight do not constitute lack of due process although a significant error or misleading advice of counsel may constitute a denial of due process of law.³¹ Where the accused has employed counsel, the fact that such counsel should have, but did not, offer certain evidence, interpose certain objections, and reserve certain exceptions, or interpose certain motions, is not a denial of due process of law.³²

Ineffective, incompetent, or inadequate representation is the same as no counsel at all and, as such, will equal a denial of due process.³³ Where the representation by the defendant's counsel is of such low caliber as to amount to no representation at all³⁴ or when professional conduct of counsel is so lacking in competence or good faith that it shocks the conscience of the court, and the trial is reduced to sham,³⁵ farce, or mockery of justice,³⁶ permitting the proceedings to continue will constitute a denial of due process.

Depending on the circumstances of the case, in various instances it has been held that defendant's due process right to the effective assistance of counsel was not violated,³⁷ as where defendant's counsel fails to file or support a motion for a mistrial³⁸ or a new trial,³⁹ while in other instances, defendant's due process right to such assistance was denied.⁴⁰

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Footnotes

Mass.—*Com. v. Garcia*, 379 Mass. 422, 399 N.E.2d 460 (1980).

Ala.—*Taylor v. State*, 291 Ala. 756, 287 So. 2d 901 (1973).

Tex.—*Caraway v. State*, 417 S.W.2d 159 (Tex. Crim. App. 1967).

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U.S.—*U.S. ex rel. Weber v. Ragen*, 176 F.2d 579 (7th Cir. 1949).

Ill.—*People v. McCraven*, 97 Ill. App. 3d 1075, 53 Ill. Dec. 610, 424 N.E.2d 23 (1st Dist. 1981).

S.C.—*State v. Lewis*, 255 S.C. 466, 179 S.E.2d 616 (1971).

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U.S.—*Drake v. Wyrick*, 640 F.2d 912 (8th Cir. 1981); *McGarrity v. Beto*, 335 F. Supp. 1186 (S.D. Tex. 1971), order aff'd, 452 F.2d 1206 (5th Cir. 1971).

Cal.—*People v. Corona*, 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1st Dist. 1978).

U.S.—*Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir. 1982).

N.Y.—*People v. Jarvis*, 113 A.D.3d 1058, 978 N.Y.S.2d 522 (4th Dep't 2014), leave to appeal granted, 22 N.Y.3d 1160, 984 N.Y.S.2d 644, 7 N.E.3d 1132 (2014) and aff'd, 25 N.Y.3d 968, 2015 WL 1524611 (2015).

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U.S.—*U. S. ex rel. Darcy v. Handy*, 203 F.2d 407 (3d Cir. 1953); *Ellis v. State of N.J.*, 282 F. Supp. 298 (D.N.J. 1967), judgment aff'd, 388 F.2d 988 (3d Cir. 1968); *Thomasson v. Slayton*, 340 F. Supp. 597 (W.D. Va. 1972).

Mo.—*State v. Lang*, 491 S.W.2d 12 (Mo. Ct. App. 1973).

Okla.—*Johnson v. State*, 1970 OK CR 173, 476 P.2d 395 (Okla. Crim. App. 1970).

S.C.—*State v. Lewis*, 255 S.C. 466, 179 S.E.2d 616 (1971).

Miss.—*Kiker v. State*, 55 So. 3d 1060 (Miss. 2011).

U.S.—*U. S. ex rel. Darcy v. Handy*, 203 F.2d 407 (3d Cir. 1953); *Ellis v. State of N.J.*, 282 F. Supp. 298 (D.N.J. 1967), judgment aff'd, 388 F.2d 988 (3d Cir. 1968); *Thomasson v. Slayton*, 340 F. Supp. 597 (W.D. Va. 1972).

Mo.—*State v. Lang*, 491 S.W.2d 12 (Mo. Ct. App. 1973).

Okla.—*Johnson v. State*, 1970 OK CR 173, 476 P.2d 395 (Okla. Crim. App. 1970).

S.C.—*State v. Lewis*, 255 S.C. 466, 179 S.E.2d 616 (1971).

Alaska—*Moore v. State*, 123 P.3d 1081 (Alaska Ct. App. 2005).

Or.—*Shipman v. Gladden*, 253 Or. 192, 453 P.2d 921 (1969).

Tex.—*Ex parte Harris*, 596 S.W.2d 893 (Tex. Crim. App. 1980).

U.S.—*Anders v. State of Cal.*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967); *Barker v. Wainwright*, 459 F.2d 8 (5th Cir. 1972).

Cal.—*Bridgeforth v. Superior Court*, 214 Cal. App. 4th 1074, 154 Cal. Rptr. 3d 528 (2d Dist. 2013), review filed, (May 3, 2013).

U.S.—*Zuck v. State of Ala.*, 588 F.2d 436 (5th Cir. 1979).

U.S.—*U.S. v. Alvarez*, 580 F.2d 1251 (5th Cir. 1978); *Holland v. Henderson*, 317 F. Supp. 438 (E.D. La. 1970), judgment aff'd, 460 F.2d 978 (5th Cir. 1972).

Ill.—*People v. Gregory*, 73 Ill. App. 3d 127, 29 Ill. Dec. 354, 391 N.E.2d 779 (2d Dist. 1979).

La.—*State ex rel. Thompson v. Henderson*, 306 So. 2d 713 (La. 1975).

Removed from representation of second defendant

Counsel had an actual conflict of interest in a joint prosecution for second-degree murder that implicated the Sixth Amendment right to counsel and the rights to due process and a fair trial for both defendants; counsel had been appointed to represent both defendants early in the prosecution and, before being removed from representation of the second defendant, had received confidential communications from the second defendant about the alleged crime.

La.—*State v. Tensley*, 955 So. 2d 227 (La. Ct. App. 2d Cir. 2007), writ denied, 969 So. 2d 629 (La. 2007).

- 21 U.S.—*Harris v. Stephens*, 361 F.2d 888 (8th Cir. 1966).
Mo.—*State v. Boyd*, 913 S.W.2d 838 (Mo. Ct. App. E.D. 1995).
Ohio—*State v. Oliver*, 23 Ohio App. 2d 210, 52 Ohio Op. 2d 308, 262 N.E.2d 424 (8th Dist. Cuyahoga County 1970).
Pa.—*Com. v. Smith*, 228 Pa. Super. 256, 323 A.2d 838 (1974).
- 22 U.S.—*U.S. v. Cedeno*, 496 F. Supp. 2d 562 (E.D. Pa. 2007).
- 23 U.S.—*Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); *Honneus v. U.S.*, 509 F. Supp. 1135 (D. Mass. 1981).
Ga.—*Montgomery v. State*, 156 Ga. App. 448, 275 S.E.2d 72 (1980).
- 24 U.S.—*U.S. v. Taft*, 221 Fed. Appx. 277 (4th Cir. 2007).
- 25 U.S.—*U. S. ex rel. Kopetka v. Young*, 310 F. Supp. 1001 (D. Minn. 1970).
- 26 Ill.—*People v. Connor*, 82 Ill. App. 3d 652, 37 Ill. Dec. 860, 402 N.E.2d 862 (1st Dist. 1980).
Tex.—*Coble v. State*, 501 S.W.2d 344 (Tex. Crim. App. 1973).
- 27 N.Y.—*People v. Padgett*, 32 A.D.2d 672, 300 N.Y.S.2d 612 (2d Dep't 1969), judgment aff'd, 27 N.Y.2d 841, 316 N.Y.S.2d 637, 265 N.E.2d 460 (1970).
- 28 Mo.—*Kelly v. State*, 623 S.W.2d 65 (Mo. Ct. App. W.D. 1981).
- 29 U.S.—*Johnson v. U.S.*, 480 F.2d 142 (5th Cir. 1973); *Drake v. Wyrick*, 640 F.2d 912 (8th Cir. 1981); *U. S. ex rel. Williams v. Com. of Pa.*, 378 F. Supp. 1295 (E.D. Pa. 1974); *Turner v. U.S.*, 423 F. Supp. 581 (E.D. Va. 1976).
Ill.—*People v. Redmond*, 50 Ill. 2d 313, 278 N.E.2d 766 (1972).
- 30 U.S.—*U. S. ex rel. Preston v. Ellingsworth*, 408 F. Supp. 568 (D. Del. 1975).
Ill.—*People v. Redmond*, 50 Ill. 2d 313, 278 N.E.2d 766 (1972).
Ind.—*Johnson v. State*, 251 Ind. 17, 238 N.E.2d 651 (1968).
- 31 U.S.—*Arrastia v. U.S.*, 455 F.2d 736 (5th Cir. 1972).
Mo.—*Sanders v. State*, 556 S.W.2d 486 (Mo. Ct. App. 1977).
Guilt-based defense
Defense counsel's imposition of a guilt-based defense against defendant's wishes in murder prosecution violated defendant's fundamental right to enter a plea of not guilty, interfered with defendant's due process right to a fair trial, and deprived defendant of effective assistance of counsel in manner that was prejudicial per se, and thus, no showing that outcome of trial would have been different absent defense counsel's conduct was required.
Kan.—*State v. Carter*, 270 Kan. 426, 14 P.3d 1138 (2000).
- 32 U.S.—*U.S. ex rel. Hamby v. Ragen*, 178 F.2d 379 (7th Cir. 1949); *Hendrickson v. Overlade*, 131 F. Supp. 561 (N.D. Ind. 1955).
Mo.—*State v. Turner*, 353 S.W.2d 602 (Mo. 1962).
- 33 Ill.—*People v. Corder*, 103 Ill. App. 3d 434, 59 Ill. Dec. 200, 431 N.E.2d 701 (3d Dist. 1982).
N.D.—*State v. McKay*, 234 N.W.2d 853 (N.D. 1975).
- 34 U.S.—*Miller v. Hudspeth*, 176 F.2d 111 (10th Cir. 1949).
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- 35 U.S.—*U.S. v. Steed*, 465 F.2d 1310 (9th Cir. 1972); *U. S. ex rel. Adams v. Rundle*, 294 F. Supp. 194 (E.D. Pa. 1968).
Ark.—*Abbott v. State*, 256 Ark. 558, 508 S.W.2d 733 (1974).
Ill.—*People v. Steel*, 52 Ill. 2d 442, 288 N.E.2d 355 (1972).
Kan.—*Winter v. State*, 210 Kan. 597, 502 P.2d 733 (1972).
Mich.—*People v. Hill*, 21 Mich. App. 178, 175 N.W.2d 305 (1970).
Nev.—*Sullivan v. Warden, Nevada State Prison*, 91 Nev. 563, 540 P.2d 112 (1975).
Tenn.—*Weaver v. State*, 4 Tenn. Crim. App. 435, 472 S.W.2d 898 (1971).
- 36 N.C.—*State v. Carter*, 210 N.C. App. 156, 707 S.E.2d 700 (2011).
- 37 U.S.—*U.S. v. Cohen*, 427 F.3d 164 (2d Cir. 2005); *Nelson v. Estelle*, 642 F.2d 903 (5th Cir. 1981); *Honeycutt v. Roper*, 426 F.3d 957 (8th Cir. 2005); *Taylor v. Warden, Md. Penitentiary*, 307 F. Supp. 1192 (D. Md. 1969).
Colo.—*People v. Mack*, 638 P.2d 257 (Colo. 1981).
Neb.—*State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003).
N.M.—*State v. Romero*, 96 N.M. 795, 1981-NMCA-108, 635 P.2d 998 (Ct. App. 1981).

- 38 N.C.—*State v. Verrier*, 173 N.C. App. 123, 617 S.E.2d 675 (2005).
Wash.—*State v. Cook*, 31 Wash. App. 165, 639 P.2d 863 (Div. 1 1982).
39 N.M.—*State v. Paul*, 83 N.M. 527, 1972-NMCA-024, 494 P.2d 189 (Ct. App. 1972).
Fla.—*Farmer v. State*, 366 So. 2d 1271 (Fla. 4th DCA 1979).
Iowa—*State v. Watson*, 193 N.W.2d 96 (Iowa 1971).
Mo.—*White v. State*, 430 S.W.2d 144 (Mo. 1968).
40 Cal.—*In re Rodriguez*, 119 Cal. App. 3d 457, 174 Cal. Rptr. 67 (1st Dist. 1981).
Or.—*DeHart v. State*, 55 Or. App. 254, 637 P.2d 1311 (1981).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

G. Disclosure and Discovery; Notice of Defense

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Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

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G. Disclosure and Discovery; Notice of Defense

§ 1688. Disclosure and discovery, generally

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In a criminal case, pretrial discovery in favor of the accused is not required by due process, and, as a general principle, the Due Process Clause has little to say regarding the amount of discovery which the parties in a criminal trial must be afforded although it does speak to the balance of the forces between the accused and the accuser.

In a criminal case, pretrial discovery in favor of the accused is not required by due process,¹ and as a general principle, the Due Process Clause has little to say regarding the amount of discovery which the parties in a criminal trial must be afforded² although it does speak to the balance of forces between the accused and the accuser.³ Thus, due process is denied where the overall balance of discovery is tipped against the defendant and in favor of the government.⁴ The Due Process Clause of its own force does not require a state to adopt discovery procedures for the benefit of criminal defendants, but in the absence of a strong showing of state interests to the contrary, any discovery procedure adopted must be a two-way street.⁵ Even so, a prisoner has no substantive due process right of access to the State's evidence so that new DNA-testing technology can be applied that might prove him or her innocent.⁶

Although broad discovery is not compelled as a matter of due process,⁷ and a denial of a broad discovery motion for all evidence is not a denial of due process,⁸ the growth of discovery devices in criminal cases is a salutary development which enhances the fairness of the adversary system, and nothing in the Due Process Clause precludes the states from experimenting with systems of broad discovery designed to achieve these goals.⁹ Therefore, discovery prior to trial should be as full and free as possible consistent with protections of persons, effective law enforcement, the adversary system, and national security.¹⁰

The State violates a defendant's right to due process if it knowingly uses false evidence or allows it to go uncorrected.¹¹ Favorable evidence is subject to constitutionally mandated disclosure when it could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.¹² When the failure of discovery results in complete surprise on a crucial issue, then due process will also be impacted.¹³

According to some courts, reversal is not required where the evidence, although useful to the defense, was not likely to have changed the verdict.¹⁴ According to other courts, a reviewing court determining the materiality of withheld evidence, however, must ascertain not whether the defendant would more likely than not have received a different verdict with the evidence but whether in its absence he or she received a fair trial, understood as a trial resulting in a verdict worthy of confidence.¹⁵

Disclosure of agreements or plea bargaining negotiations.

Due process mandates that the jury be informed of any understanding or agreements reached between the prosecutor and an alleged accomplice on whose testimony the State's case depends.¹⁶ Such a promise or an understanding between the prosecution and the witness is critical evidence that is material to the case.¹⁷ It is exculpatory evidence that must be disclosed by the government to the defendant in order to comply with due process.¹⁸ The failure of the government to disclose to the defense and to the trial jury the existence of plea bargaining negotiations with a key witness deprives defendant of due process of law¹⁹ and undermines confidence in the outcome of the trial.²⁰

Privilege of confidentiality.

Where there are reasonable grounds to believe that information in the possession of a newsman is material to proof of any element of a criminal offense, or to proof of the defense asserted by the defendant, or to a reduction in the classification or gradation of the offense charged, or to a mitigation of the penalty attached, and the defendant's need to acquire such information which is not otherwise available is essential to a fair trial, the defendant has a due process right to compel disclosure of such information and the identity of the source.²¹

The privilege of confidentiality should yield only when the defendant's need is essential to a fair trial, and whether the need is essential to due process must be determined from the facts and circumstances in each case²² although there is authority to the contrary.²³

The State's policy interest in protecting the confidentiality of the physician-patient relationship must yield to the mandate of constitutional due process considerations when the need for disclosure is present.²⁴ Nevertheless, a defendant's constitutional right to evidence does not include an unsupervised romp through another person's confidential healthcare records.²⁵

In camera hearing.

When the defendant seeks to compel disclosure by the State of evidence material to his or her defense and embodied in the statement of a witness for the prosecution, the requirements of due process are satisfied by the order of the trial judge directing that an in camera hearing be held on the attempt to compel disclosure.²⁶ Thus, when a defendant seeks potentially privileged information, the proper procedure for protecting the defendant's due process rights is for the trial court to conduct an in camera review to determine whether the records are actually privileged.²⁷ Furthermore, a court's in camera inspection of material provides a check on the prosecution's determinations and helps protect the defendant's due process right to an effective defense at trial.²⁸

CUMULATIVE SUPPLEMENT

Cases:

Evidence is "material," within the meaning of the *Brady* due process rule requiring the government to disclose material exculpatory evidence, when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different, and a "reasonable probability" of a different result is one in which the suppressed evidence undermines confidence in the outcome of the trial. *U.S.C.A. Const.Amend.* 5, 14. *Turner v. U.S.*, 2017 WL 2674152 (U.S. 2017).

Defendant was not prejudiced, as element for *Brady* due process claim, by state's failure to disclose to defendant notes from police interviews in which three witnesses stated that defendant was drunk and was acting weird when he had helped murder victim move into her apartment, where the witness statements were cumulative to evidence introduced at trial. *U.S. Const. Amend.* 14. *Bradford v. Davis*, 923 F.3d 599 (9th Cir. 2019).

Criminal defendants have a due process right to information that is favorable to their defense and material to guilt or punishment. *U.S. Const. Amend.* 14. *State v. Hoff*, 2016 MT 244, 385 Mont. 85, 385 P.3d 945 (2016).

[END OF SUPPLEMENT]

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Nev.—*Thompson v. State*, 93 Nev. 342, 565 P.2d 1011 (1977).
R.I.—*State v. Darcy*, 442 A.2d 900 (R.I. 1982).
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Ala.—*State v. Fowler*, 32 So. 3d 21 (Ala. 2009).
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- 5 U.S.—*Wardius v. Oregon*, 412 U.S. 470, 93 S. Ct. 2208, 37 L. Ed. 2d 82 (1973).
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- 6 U.S.—*District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009).
- 7 La.—*State v. May*, 339 So. 2d 764 (La. 1976).

- 8 U.S.—*U.S. v. Conder*, 423 F.2d 904 (6th Cir. 1970).
- N.C.—*State v. Kaplan*, 23 N.C. App. 410, 209 S.E.2d 325 (1974).
- 9 U.S.—*Wardius v. Oregon*, 412 U.S. 470, 93 S. Ct. 2208, 37 L. Ed. 2d 82 (1973).
- 10 Wash.—*State v. Boyd*, 160 Wash. 2d 424, 158 P.3d 54 (2007).
- 11 U.S.—*Carr v. Schofield*, 364 F.3d 1246 (11th Cir. 2004).
- 12 U.S.—*Cone v. Bell*, 556 U.S. 449, 129 S. Ct. 1769, 173 L. Ed. 2d 701, 50 A.L.R. Fed. 2d 597 (2009).
- 13 R.I.—*State v. Darcy*, 442 A.2d 900 (R.I. 1982).
- 14 U.S.—*Carr v. Schofield*, 364 F.3d 1246 (11th Cir. 2004).
- 15 U.S.—*Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379 (4th Cir. 2014).
- La.—*Jones v. Cain*, 151 So. 3d 781 (La. Ct. App. 4th Cir. 2014).
- 16 U.S.—*U.S. v. Iverson*, 648 F.2d 737 (D.C. Cir. 1981).
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- Ga.—*Dudley v. State*, 148 Ga. App. 560, 251 S.E.2d 815 (1978).
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- 23 U.S.—*Karem v. Priest*, 744 F. Supp. 136 (W.D. Tex. 1990).
- A.L.R. Library**
Reportorial privilege as to nonconfidential news information, 60 A.L.R.5th 75.
- 24 N.Y.—*People v. Lowe*, 96 Misc. 2d 33, 408 N.Y.S.2d 873 (N.Y. City Crim. Ct. 1978).
- 25 R.I.—*State v. Burnham*, 58 A.3d 889 (R.I. 2013).
- 26 U.S.—*U.S. v. Jones*, 612 F.2d 453 (9th Cir. 1979).
- Wash.—*State v. Allen*, 27 Wash. App. 41, 615 P.2d 526 (Div. 1 1980).
- 27 Mo.—*State v. Julius*, 453 S.W.3d 288 (Mo. Ct. App. E.D. 2014).
- 28 U.S.—*Contreras v. Artus*, 778 F.3d 97 (2d Cir. 2015).

16C C.J.S. Constitutional Law § 1689

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

G. Disclosure and Discovery; Notice of Defense

§ 1689. Disclosure of witnesses or informants

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4594(4)

Due process limitations requiring the prosecution to turn over to the defendant any information favorable to the defense are applicable where the prosecution is aware of the existence of a witness who would testify favorably to the accused; under some circumstances, due process may require the State to disclose the existence and identity of an informant.

Due process limitations requiring the prosecution to turn over to the defendant any information favorable to the defense¹ are applicable where the prosecution is aware of the existence of a witness who would testify favorably to the accused.² Due process is not violated unless a material witness' unavailability is attributable to unilateral government action,³ and unless the defendant could conceivably benefit from a missing witness' testimony, and unless there is prejudice because of that person's absence, there is no denial of due process.⁴ The defendant, when claiming improper denial of access to a potential witness on due process grounds, must make a showing of more than merely a witness' inaccessibility⁵ and the defendant's due process rights are not violated as a result of his or her lack of access to the witnesses before trial.⁶ When the State deliberately conceals an eyewitness to a crime, due process is violated.⁷

The prosecution's failure to comply with the rules requiring the disclosure of witnesses must result in the defense attorney's being manifestly surprised before it gives rise to a violation of due process,⁸ and there is no denial of due process where the defense is furnished the name and address of a witness.⁹ The pretrial disclosure rules in criminal cases which require petitioner to disclose his or her character witnesses prior to trial do not violate the Fifth Amendment because the rules allow for reciprocal discovery from the State.¹⁰

The Due Process Clause does not require that the prosecution reveal before the trial the names of undercover agents or other witnesses who will testify unfavorably to the defense.¹¹

Informants.

The use of an informer by the government does not deny the accused due process.¹² Under some circumstances, due process may require the State to disclose the existence and the identity of an informant.¹³ However, the failure to disclose the identity of an informant is not necessarily a denial of due process,¹⁴ such as at a pretrial hearing¹⁵ or where the informant could not provide potentially significant exculpatory testimony.¹⁶ The defendant does not have due process rights to the disclosure of the identity of an informant who provided only information which, combined with other facts, gave the officers probable cause to arrest.¹⁷

Due process does not require the State to call or produce an informant under all circumstances,¹⁸ and the failure to produce an informant does not constitute a denial of due process,¹⁹ as where defendant knows the identity of the informant,²⁰ or where the government uses reasonable efforts to produce an informant but fails to locate him.²¹ However, where defendant cannot obtain a fair trial without the presence of an informer, he or she is denied due process by the failure of the government to produce the informer even though the government used due diligence in an unsuccessful effort to locate the informer.²²

Deportation of alien witness.

The unilateral act of deporting aliens who are potential witnesses to a criminal act may deprive defendant of rights guaranteed under the Due Process Clause,²³ but in order to show a denial of due process, defendant is required to make some plausible explanation of the assistance which he or she would have received from the aliens' testimony.²⁴ A violation of due process requires some showing that the evidence lost would be both material and favorable to the defense,²⁵ and in the absence of such showing, there is no denial of due process.²⁶

CUMULATIVE SUPPLEMENT

Cases:

State's failure to disclose material evidence in death penalty prosecution, including inmates' statements casting doubt on credibility of State's star witness, violated defendant's due process rights, where trial evidence resembled a house of cards, built on jury crediting star witness's account rather than defendant's alibi. [U.S.C.A. Const.Amend. 14. *Wearry v. Cain*, 136 S. Ct. 1002 \(2016\).](#)

State satisfied its obligations with respect to defendant's rights under State Constitution's due process clause with its inquiries of police commission and police department for information pertaining to truth or veracity of the testifying police officers, which came back negative. [Haw. Const. art. 1, § 5; Haw. R. Penal P. 16. *State v. Alkire*, 468 P.3d 87 \(Haw. 2020\).](#)

Even if no agreement existed between codefendant and prosecutor regarding sentencing recommendation, prosecutor was required under Due Process Clause and Confrontation Clause to disclose that codefendant's testimony at defendant's robbery trial was motivated by possibility of prosecutor's recommendation of youthful offender sentencing, since indication that codefendant's testimony would be taken into account by prosecutor for sentencing recommendation was strongly probative of the codefendant's credibility. [U.S. Const. Amends. 5, 6](#); [Haw. Const. art. 1, §§ 5, 14](#). [Birano v. State, 143 Haw. 163, 426 P.3d 387 \(2018\)](#).

For purposes of due process, evidence favorable to an accused that must be disclosed by the State can be either impeachment evidence or exculpatory evidence. [U.S. Const. Amend. 14](#). [State v. Hoque, 837 S.E.2d 464 \(N.C. Ct. App. 2020\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 La.—[Jones v. Cain, 151 So. 3d 781 \(La. Ct. App. 4th Cir. 2014\)](#).
Dispositive evidence
 "Favorable evidence," which the government is required to disclose to a criminal defendant, need not be dispositive evidence; evidence may be favorable or exculpatory, and thus required to be disclosed, although it is not absolutely destructive of the government's case or highly demonstrative of the defendant's innocence.
 Mass.—[Com. v. Daniels, 445 Mass. 392, 837 N.E.2d 683 \(2005\)](#).
- 2 U.S.—[Jackson v. Wainwright, 390 F.2d 288 \(5th Cir. 1968\)](#).
 La.—[State v. Brooks, 386 So. 2d 1348 \(La. 1980\)](#).
- 3 U.S.—[U.S. v. Gonzales, 617 F.2d 1358 \(9th Cir. 1980\)](#).
- 4 U.S.—[U.S. v. Gonzales, 617 F.2d 1358 \(9th Cir. 1980\)](#).
 N.C.—[State v. Simmons, 56 N.C. App. 34, 286 S.E.2d 898 \(1982\)](#).
- 5 U.S.—[Kines v. Butterworth, 669 F.2d 6 \(1st Cir. 1981\)](#).
- 6 U.S.—[Kines v. Butterworth, 669 F.2d 6 \(1st Cir. 1981\)](#).
- 7 U.S.—[Freeman v. State of Ga., 599 F.2d 65 \(5th Cir. 1979\)](#).
- 8 U.S.—[Hardin v. Wainwright, 678 F.2d 589 \(5th Cir. 1982\)](#).
- 9 Ala.—[Taylor v. State, 371 So. 2d 971 \(Ala. Crim. App. 1979\)](#), writ denied, [371 So. 2d 975 \(Ala. 1979\)](#).
 Ill.—[People v. Hammond, 82 Ill. App. 3d 839, 38 Ill. Dec. 217, 403 N.E.2d 305 \(4th Dist. 1980\)](#).
- 10 U.S.—[Thomas v. Wyrick, 520 F. Supp. 139 \(E.D. Mo. 1981\)](#), judgment aff'd, [687 F.2d 235, 11 Fed. R. Evid. Serv. 455 \(8th Cir. 1982\)](#).
- 11 U.S.—[Weatherford v. Bursey, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 \(1977\)](#).
 Ariz.—[State v. Taylor, 112 Ariz. 68, 537 P.2d 938 \(1975\)](#).
 N.Y.—[People v. Olsen, 100 Misc. 2d 947, 420 N.Y.S.2d 314 \(Sup 1979\)](#).
- 12 U.S.—[U.S. v. Durham, 413 F.2d 1003 \(5th Cir. 1969\)](#).
 Ill.—[People v. Carter, 109 Ill. App. 2d 15, 248 N.E.2d 847 \(1st Dist. 1969\)](#).
- 13 U.S.—[Gaines v. Hess, 662 F.2d 1364, 9 Fed. R. Evid. Serv. 435 \(10th Cir. 1981\)](#).
 Fla.—[State v. Hassberger, 350 So. 2d 1 \(Fla. 1977\)](#).
 Ill.—[People v. Holmes, 135 Ill. 2d 198, 142 Ill. Dec. 172, 552 N.E.2d 763 \(1990\)](#); [People v. Forsythe, 84 Ill. App. 3d 643, 40 Ill. Dec. 357, 406 N.E.2d 58 \(1st Dist. 1980\)](#).
- 14 U.S.—[U.S. v. Vargas, 931 F.2d 112 \(1st Cir. 1991\)](#).
 Ala.—[Davis v. State, 46 Ala. App. 45, 237 So. 2d 635 \(Crim. App. 1969\)](#), judgment aff'd, [286 Ala. 117, 237 So. 2d 640 \(1970\)](#).
 Ill.—[People v. Fields, 65 Ill. App. 3d 278, 22 Ill. Dec. 17, 382 N.E.2d 337 \(1st Dist. 1978\)](#).
Murder victim acting as informant in other cases
 Information that a murder victim had acted as an informant in other cases was not material without at least some evidence that this activity had generated actual threats against her, and thus, the State had no due process duty under *Brady* to disclose the information.

Nev.—*Evans v. State*, 117 Nev. 609, 28 P.3d 498 (2001).

Jailhouse informant

Murder defendant against whom jailhouse informant had given testimony regarding inculpatory statements allegedly made by defendant while in county jail failed to establish existence of system in county jail of encouraging inmates to recount fabricated confessions as required to support claim that prosecution's failure to disclose existence of such a system had violated defendant's due process rights.

Cal.—*People v. Jenkins*, 22 Cal. 4th 900, 95 Cal. Rptr. 2d 377, 997 P.2d 1044 (2000), as modified, (June 28, 2000).

Ky.—*Porter v. Com.*, 394 S.W.3d 382 (Ky. 2011).

U.S.—*Gaines v. Hess*, 662 F.2d 1364, 9 Fed. R. Evid. Serv. 435 (10th Cir. 1981).

N.C.—*State v. Ketchie*, 286 N.C. 387, 211 S.E.2d 207 (1975).

U.S.—*McCray v. State of Ill.*, 386 U.S. 300, 87 S. Ct. 1056, 18 L. Ed. 2d 62 (1967); *U.S. v. Marshall*, 526 F.2d 1349 (9th Cir. 1975).

N.C.—*State v. Hardy*, 299 N.C. 445, 263 S.E.2d 711 (1980).

Ill.—*People v. Contursi*, 73 Ill. App. 3d 458, 29 Ill. Dec. 774, 392 N.E.2d 331 (1st Dist. 1979).

U.S.—*Rubio v. Estelle*, 689 F.2d 533 (5th Cir. 1982); *U.S. v. Privett*, 443 F.2d 528 (9th Cir. 1971).

Ill.—*People v. Williams*, 45 Ill. 2d 319, 260 N.E.2d 1 (1970).

U.S.—*U.S. v. Hargrove*, 647 F.2d 411 (4th Cir. 1981).

Cal.—*People v. Rios*, 74 Cal. App. 3d 833, 141 Cal. Rptr. 677 (2d Dist. 1977).

Utah—*State v. Stone*, 629 P.2d 442 (Utah 1981).

U.S.—*U.S. v. Glickman*, 604 F.2d 625 (9th Cir. 1979).

Ill.—*People v. Wilkins*, 252 Ill. App. 3d 646, 192 Ill. Dec. 207, 625 N.E.2d 167 (1st Dist. 1993).

U.S.—*U.S. v. Williams*, 488 F.2d 788 (10th Cir. 1973).

U.S.—*U.S. v. Castillo*, 615 F.2d 878 (9th Cir. 1980).

U.S.—*U.S. v. Valenzuela-Bernal*, 458 U.S. 858, 102 S. Ct. 3440, 73 L. Ed. 2d 1193, 11 Fed. R. Evid. Serv. 1 (1982).

U.S.—*U.S. v. Valenzuela-Bernal*, 458 U.S. 858, 102 S. Ct. 3440, 73 L. Ed. 2d 1193, 11 Fed. R. Evid. Serv. 1 (1982).

U.S.—*U.S. v. Marquez-Amaya*, 686 F.2d 747 (9th Cir. 1982).

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16C C.J.S. Constitutional Law § 1690

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

G. Disclosure and Discovery; Notice of Defense

§ 1690. Suppression of evidence

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4593 to 4597

The disclosure of evidence to the defendant is one of the obligations due process imposes on law enforcement and investigatory agencies to insure that every criminal trial is a search for truth, not an adversary game, and suppression of evidence may be a denial of due process when it is vital evidence, material to the issues of guilt or punishment.

The disclosure of evidence to the defendant is one of the obligations due process imposes on law enforcement and investigatory agencies to insure that every criminal trial is a search for truth, not an adversary game.¹ The requirements of due process do not seek to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.² At trial, the prosecutor has a duty under the due process of law requirement to bring to the attention of the court, or of proper officials, all significant evidence suggestive of innocence or mitigation³ and to disclose relevant and material evidence to the defense.⁴ Defendant's right to be protected against the prosecution's failure to disclose exculpatory evidence is founded upon the Due Process Clause and is designed to assure a fair trial and not to deter or punish the prosecution.⁵

Due process requires that there be no suppression by the State of evidence in its files which may be favorable to the accused,⁶ and suppression of evidence may be a denial of due process when it is vital evidence,⁷ material to the issue of guilt or punishment.⁸

In the absence of actual suppression of favorable evidence, the prosecution does not violate due process by denying discovery.⁹ For purposes of determining whether a state has committed a *Brady* violation, the first factor courts look at in the due process inquiry is the reason for the nondisclosure, and, in so doing, courts apply the deliberate suppression standard; a "deliberate suppression" exists when the prosecution makes a considered decision to suppress for the purpose of obstructing, or where it fails to disclose evidence whose high value to the defense could not have escaped its attention.¹⁰ A deliberate suppression of evidence is a per se violation of due process sufficient to reverse or nullify a conviction.¹¹

The ultimate issue with respect to the determination of whether the prosecutor's nondisclosure of information favorable to the defense is a violation of due process is whether the prosecutor's omission is of sufficient significance to result in a denial of the defendant's right to a fair trial.¹² Whether defendant has been deprived of his or her due process rights depends on the materiality of the missing evidence, the likelihood of mistaken interpretation of it by witnesses or the jury, and the reasons for its nonavailability to the defense;¹³ it has been held, however, that the failure to preserve evidence which is material exculpatory evidence violates due process¹⁴ without the necessity of showing the reasons for its unavailability.¹⁵

The elements of the potential due process violation arising from prosecutorial nondisclosure vary with the factual circumstances,¹⁶ and in determining whether the unavailability of evidence has deprived the defendant of due process of law, the trial court must balance the totality of the circumstances surrounding the missing evidence.¹⁷ Not all information in the prosecution's files must be turned over as a matter of constitutional due process.¹⁸ Due process does not require the State to disclose any or all information a defendant might consider helpful,¹⁹ and it is not violated when the State refuses to open its files for fishing expeditions²⁰ or where the withheld information is not exculpatory.²¹

The withholding of the existence of evidence by a state investigation officer may be imputed to the prosecution when determining whether the State violated the defendant's due process rights by withholding exculpatory information.²² In other words, a police investigator's knowledge of evidence in a criminal case is imputed to the prosecutor, and therefore, a prosecutor's duty to disclose favorable or exculpatory evidence under the due process clauses of federal and state constitutions includes disclosure of evidence that is known only to a police investigator and not to the prosecutor.²³

Due process does not mandate the discovery of the prosecuting attorney's work product pertaining to prospective jurors.²⁴ For instance, a trial court's denial of a defendant's request for the criminal record information records for all of the prospective jurors in his or her, after the prosecutor has obtained the records for some jurors, will not violate due process rights where the defendant fails to show any juror bias.²⁵ The inability of counsel to obtain preliminary hearing transcript is not per se a denial of due process although in certain limited situations, its possession could be viewed as the essence of effective trial preparation.²⁶ Denying defendant the minutes of the grand jury proceeding by which he or she was indicted does not deny him or her due process of law²⁷ although it has been held that where the grand jury minutes do not contain matter that must be kept confidential or the disclosure of the minutes is not inimical to public interest, due process requires the disclosure of the minutes.²⁸ What's more, the government's refusal to turn over the transcripts of an agent's false and misleading grand jury testimony until ordered to do so after the defendant's jury trial has begun is a violation of due process where the defendant's efforts to discredit the government's case are significantly impeded.²⁹

Motion to suppress.

Under the Federal Magistrates Act, due process rights of the defendant are adequately protected by the fact that the district court judge alone acts as the ultimate decision maker on defendant's suppression motion, with the broad discretion to accept, reject, or modify the magistrate's proposed findings, including the discretion of hearing witnesses live to resolve conflicting

credibility claims, and by the fact that the statutory scheme includes sufficient procedures to alert the judge whether to exercise its discretion to conduct a hearing and view the witnesses itself, and permitting the judge to make a de novo determination of contested credibility assessments without personally hearing the live testimony does not violate due process.³⁰

So, the accused's due process rights are not violated when a judge refers a motion to suppress to a magistrate, reviews the record of the hearing before the magistrate and adopts the magistrate's recommendations.³¹ However, in a case in which the magistrate recommends a finding favorable to the defendant, the judge may not reject that finding and adopt a finding favorable to the government without providing a fresh hearing at which the judge could evaluate firsthand the credibility of the witnesses as to do so would be to violate a defendant's rights under the Due Process Clause.³²

Coroner retaining possession of body.

With respect to preservation of evidence, due process does not require that a coroner retain possession of a body until defendant requests permission to conduct his or her own autopsy examination.³³

CUMULATIVE SUPPLEMENT

Cases:

The government violates the Constitution's Due Process Clause if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment. [U.S.C.A. Const.Amend. 5, 14. Turner v. U.S., 2017 WL 2674152 \(U.S. 2017\).](#)

The overriding concern of the *Brady* rule, that the Government's withholding of material exculpatory evidence violates due process, is with the justice of the finding of guilt, and that the Government's interest in a criminal prosecution is not that it shall win a case, but that justice shall be done. [U.S.C.A. Const.Amend. 5, 14. Turner v. U.S., 2017 WL 2674152 \(U.S. 2017\).](#)

Government's disclosure obligations in criminal cases have teeth: government's suppression of evidence favorable to the accused violates due process. [U.S. Const. Amend. 5; Fed. R. Crim. P. 16\(a\). United States v. Kifwa, 868 F.3d 55 \(1st Cir. 2017\).](#)

To prove due process violation arising from government's suppression of material exculpatory evidence, defendants must prove both but-for causation and proximate causation in other words, that alleged wrongful acts caused their loss of liberty and that loss of liberty was reasonably foreseeable result of act. [U.S. Const. Amend. 14. Gilliam v. Sealey, 932 F.3d 216 \(4th Cir. 2019\).](#)

Materiality of the withheld evidence, for purposes of *Brady* due process claim, must be analyzed cumulatively, with the court first examining the force and nature of the withheld evidence item by item, and then considering the cumulative effect of the suppressed evidence, gauging the collective impact by stepping back and considering the strength of the prosecution's case. [U.S. Const. Amend. 14. Hooper v. Shinn, 985 F.3d 594 \(9th Cir. 2021\).](#)

When the State suppresses or fails to disclose material exculpatory evidence, a due process violation results, and the question of bad faith is irrelevant. [U.S. Const. Amend. 14. Davis v. Sellers, 940 F.3d 1175 \(11th Cir. 2019\).](#)

If the state suppresses evidence favorable to a defendant and material to either the guilt or penalty phase, due process is violated. [U.S. Const. Amend. 14. Shockley v. State, 579 S.W.3d 881 \(Mo. 2019\).](#)

[END OF SUPPLEMENT]

Footnotes

- 1 Wash.—*State v. Wright*, 87 Wash. 2d 783, 557 P.2d 1 (1976).
- 2 Cal.—*In re Sodersten*, 146 Cal. App. 4th 1163, 53 Cal. Rptr. 3d 572 (5th Dist. 2007).
- 3 U.S.—*Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976); *Gray v. Bell*, 542 F. Supp. 927 (D.D.C. 1982), order *aff'd*, 712 F.2d 490 (D.C. Cir. 1983).
- 4 U.S.—*U.S. v. Herndon*, 536 F.2d 1027 (5th Cir. 1976).
- Cal.—*People v. Foster*, 114 Cal. App. 3d 421, 170 Cal. Rptr. 597 (2d Dist. 1981).
- Utah—*State v. Jarrell*, 608 P.2d 218 (Utah 1980).
- Wash.—*State v. Jones*, 26 Wash. App. 551, 614 P.2d 190 (Div. 1 1980).
- A.L.R. Library**
- Failure of State Prosecutor to Disclose Pretrial Statement Made by Crime Victim as Violating Due Process, 102 A.L.R.5th 327.
- Failure of State Prosecutor to Disclose Fingerprint Evidence as Violating Due Process, 94 A.L.R.5th 393.
- 5 Ill.—*People v. Stamps*, 52 Ill. App. 3d 320, 10 Ill. Dec. 155, 367 N.E.2d 543 (4th Dist. 1977).
- La.—*State v. Willie*, 410 So. 2d 1019 (La. 1982).
- S.D.—*State v. Hanson*, 278 N.W.2d 198 (S.D. 1979).
- A.L.R. Library**
- Failure of State Prosecutor to Disclose Exculpatory Physical Evidence as Violating Due Process—Evidence Other Than Weapons or Personal Items, 56 A.L.R.6th 185.
- Failure of State Prosecutor to Disclose Exculpatory Physical Evidence as Violating Due Process—Personal Items Other Than Weapons, 55 A.L.R.6th 391.
- Failure of State Prosecutor to Disclose Exculpatory Physical Evidence as Violating Due Process—Weapons, 53 A.L.R.6th 81.
- Failure of State Prosecutor to Disclose Exculpatory Tape Recorded Evidence as Violating Due Process, 24 A.L.R.6th 1.
- Failure of State Prosecutor to Disclose Exculpatory Ballistic Evidence as Violating Due Process, 95 A.L.R.5th 611.
- Failure of State Prosecutor to Disclose Exculpatory Photographic Evidence as Violating Due Process, 93 A.L.R.5th 527.
- 6 U.S.—*U.S. v. Aprea*, 358 F. Supp. 1126 (S.D. N.Y. 1973).
- Cal.—*People v. Morrison*, 34 Cal. 4th 698, 21 Cal. Rptr. 3d 682, 101 P.3d 568 (2004).
- Ga.—*Brooks v. State*, 141 Ga. App. 725, 234 S.E.2d 541 (1977).
- Ind.—*State v. Bryant*, 167 Ind. App. 360, 338 N.E.2d 690 (1975).
- Wis.—*State v. Harris*, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737 (2004).
- 7 Mont.—*Taylor v. State*, 2014 MT 142, 375 Mont. 234, 335 P.3d 1218 (2014).
- 8 U.S.—*Smith v. Cain*, 132 S. Ct. 627, 181 L. Ed. 2d 571 (2012); *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); *Giglio v. U.S.*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *Lee v. U.S.*, 388 F.2d 737 (9th Cir. 1968); *McCabe v. State of N.C.*, 314 F. Supp. 917 (M.D. N.C. 1970).
- Ga.—*Brownlow v. Schofield*, 277 Ga. 237, 587 S.E.2d 647 (2003).
- Kan.—*State v. Belone*, 51 Kan. App. 2d 179, 343 P.3d 128 (2015).
- Md.—*McCoy v. Warden, Md. Penitentiary*, 1 Md. App. 108, 227 A.2d 375 (1967).
- Miss.—*Manning v. State*, 158 So. 3d 302 (Miss. 2015).
- Mont.—*State v. DuBray*, 2003 MT 255, 317 Mont. 377, 77 P.3d 247 (2003).
- N.Y.—*People v. Lewis*, 125 A.D.3d 1109, 3 N.Y.S.3d 454 (3d Dep't 2015).
- Pa.—*Com. v. Williams*, 450 Pa. 327, 301 A.2d 867 (1973).
- 9 Fla.—*Antone v. State*, 410 So. 2d 157 (Fla. 1982).
- Iowa—*State v. Eads*, 166 N.W.2d 766 (Iowa 1969).
- 10 R.I.—*State v. Ibrahim*, 862 A.2d 787 (R.I. 2004).
- 11 Conn.—*State v. Narain*, 133 Conn. App. 681, 37 A.3d 780 (2012).

- 12 U.S.—*U.S. v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) (holding modified on other grounds by, *U.S. v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)); *U.S. v. Ellsworth*, 647 F.2d 957 (9th Cir. 1981); *Grayson v. King*, 460 F.3d 1328 (11th Cir. 2006).
Colo.—*People v. Norwood*, 37 Colo. App. 157, 547 P.2d 273 (App. 1975).
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La.—*State v. Sparks*, 68 So. 3d 435 (La. 2011).
Or.—*State v. Jones*, 18 Or. App. 343, 525 P.2d 194 (1974).
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- 13 U.S.—*U.S. v. Herndon*, 536 F.2d 1027 (5th Cir. 1976).
Conn.—*State v. Johnson*, 288 Conn. 236, 951 A.2d 1257 (2008).
- 14 Ariz.—*State v. Lehr*, 227 Ariz. 140, 254 P.3d 379 (2011).
Ind.—*State v. Durrett*, 923 N.E.2d 449 (Ind. Ct. App. 2010).
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- 15 Nev.—*State v. Havas*, 95 Nev. 706, 601 P.2d 1197 (1979).
- 16 U.S.—*Zeigler v. Callahan*, 659 F.2d 254 (1st Cir. 1981); *Garrison v. Maggio*, 540 F.2d 1271 (5th Cir. 1976).
- 17 Conn.—*State v. Santos*, 146 Conn. App. 537, 78 A.3d 230 (2013), certification granted in part, 310 Conn. 962, 83 A.3d 344 (2013) and certification granted in part, 311 Conn. 927, 86 A.3d 1056 (2014).
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- 19 Ga.—*Padidham v. State*, 291 Ga. 99, 728 S.E.2d 175 (2012).
- 20 U.S.—*McGarrity v. Beto*, 335 F. Supp. 1186 (S.D. Tex. 1971), order aff'd, 452 F.2d 1206 (5th Cir. 1971).
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16C C.J.S. Constitutional Law § 1691

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

G. Disclosure and Discovery; Notice of Defense

§ 1691. Suppression of evidence—Specific request for evidence by defense

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4593 to 4597

The suppression by the prosecution of evidence favorable to the defendant, when he or she specifically requests such evidence, violates due process where the evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution.

The Due Process Clause requires disclosure, upon request, of evidence which is favorable to the defendant where the evidence is material to either guilt or punishment or impeaches the testimony of a witness whose credibility may be determinative of guilt or innocence.¹ Accordingly, the suppression by the prosecution of evidence favorable to the defendant, when he or she specifically requests such evidence, violates due process where the evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution² or where the evidence, if made available, would tend to exculpate the accused.³ Such rule is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation,⁴ and, being based on the Fourteenth Amendment, applies alike to federal and state criminal prosecutions.⁵ There is no general "public records" exception to such rule.⁶

In order to establish a due process violation, the accused must show the prosecution's suppression of evidence after a request by the defense, the favorable character of the suppressed evidence for the defense, and the materiality of the suppressed evidence.⁷

The failure to make a timely specific request for preservation of evidence is a factor to be considered in determining if the defendant has been denied due process of law.⁸ A specific request is one giving the prosecutor or police notice of exactly of what the defense desired.⁹ Also, evidence must be in the State's possession or known to the State.¹⁰ Where defendant's inability to obtain access to favorable evidence is not a consequence of any government action, there is no "suppression" within the meaning of the rule to the effect that suppression by the government of evidence favorable to the defendant is a denial of due process.¹¹

Often, the key element is the materiality of the evidence suppressed.¹² The standard of materiality may differ depending on whether defendant specifically requested the nondisclosed evidence.¹³ Where the prosecutor has not disclosed an information despite a specific defense request, the standard of materiality of the information required to establish a due process violation is whether the suppressed evidence might have affected the outcome of the trial.¹⁴ Stated another way, the suppression of favorable evidence by the prosecutor, in the face of a specific request, cannot be excused unless there appears no reasonable likelihood that the evidence would have affected the judgment of the jury¹⁵ or might have led the jury to entertain a reasonable doubt about defendant's guilt.¹⁶ In other words, disclosure of all evidence which might lead a jury to entertain a reasonable doubt about the guilt of the accused is required by due process, and this test is to be applied liberally.¹⁷ It is the material character of the evidence which is controlling and not the prosecutor's speculations as to whether or how defense counsel might have used the evidence had it been disclosed,¹⁸ and where evidence is not sufficiently material that its unavailability creates that magnitude of unfairness in the trial, there is no denial of due process.¹⁹

The rule that the suppression by the prosecution of evidence favorable to the defendant upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution, does not require that the disclosure be made before the trial as a matter of constitutional right.²⁰ In fact, according to some courts, to comply with due process, the government need only disclose all material or potentially exculpatory evidence before the trial ends.²¹ According to other courts, to be effective, such a disclosure, must be made at a time when the disclosure would be of value to the accused,²² and as long as ultimate disclosure is made before it is too late for the accused to make use of any benefits of evidence, due process is satisfied.²³ While such rule generally involves a discovery, after trial, of an information which was known to the prosecutor but unknown to the defense,²⁴ the late disclosure of such material to the defendant in the midst of the trial may also give rise to a violation of due process.²⁵

Of course, there is no violation of due process where the material information is received before or during the trial,²⁶ where evidence is available to the defendant from some source other than the prosecution,²⁷ and the defendant is aware of both the evidence and its source,²⁸ if the defendant knows or should have known of exculpatory evidence,²⁹ or where evidence is not exculpatory, but inculpatory.³⁰

In accordance with the above rules, depending on the circumstances of the case, in various instances it has been held that defendant's due process rights were violated,³¹ while in other cases, it has been held that there was no violation of due process.³²

Effect on Jencks Act.

Disclosure pursuant to the Jencks Act of documents relied upon by government witnesses who testify at trial is not seasonable disclosure of exculpatory evidence as required under the Due Process Clause,³³ but due process does not require premature production, at a pretrial hearing on a motion to suppress, of statements ultimately subject to discovery under the Jencks Act.³⁴ However, where the evidence of the government witness constitutes Jencks Act material having a direct bearing on the persuasiveness of the witness' testimony, the government's nonproduction of the evidence denies due process where the

credibility of the witness is crucial to the determination of the defendant's guilt or innocence.³⁵ The Jencks Act, as applied to a particular criminal prosecution, does not violate due process on the ground that it requires the trial judge to rule on what material is to be turned over to the defense as well as to act as impartial and unprejudiced trier of fact between defense and prosecution.³⁶

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Footnotes

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- Mass.—*Com. v. Pisa*, 372 Mass. 590, 363 N.E.2d 245 (1977).
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- Ill.—*People v. Bivins*, 97 Ill. App. 3d 386, 52 Ill. Dec. 835, 422 N.E.2d 1044 (1st Dist. 1981).
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Psychiatric record

When in context of capital sentencing proceeding state presents psychiatric evidence of indigent defendant's future dangerousness, due process requires that defendant have access to psychiatric examination on relevant issues, to testimony of psychiatrist, and to assistance and preparation at sentencing phase because

consequence of error is so great, relevance of responsive psychiatric testimony so evident, and burden on State so slim.

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Utah—*State v. Cramer*, 2002 UT 9, 44 P.3d 690 (Utah 2002).

Vt.—*State v. LeClaire*, 175 Vt. 52, 2003 VT 4, 819 A.2d 719 (2003).

33 D.C.—*Miller v. U.S.*, 14 A.3d 1094 (D.C. 2011).

34 U.S.—*Humphrey v. U.S.*, 454 U.S. 1144, 102 S. Ct. 1004, 71 L. Ed. 2d 296 (1982); *U.S. v. Truong Dinh Hung*, 667 F.2d 1105 (4th Cir. 1981).

35 U.S.—*U.S. v. Badalamente*, 507 F.2d 12 (2d Cir. 1974).

36 U.S.—*U.S. v. McGuire*, 381 F.2d 306 (2d Cir. 1967).

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16C C.J.S. Constitutional Law § 1692

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

G. Disclosure and Discovery; Notice of Defense

§ 1692. Suppression of evidence—Absence of specific request

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4593 to 4597

Where no specific request has been made for exculpatory evidence in the possession of the prosecution, or if the request is general, in order to give rise to a due process violation, the undisclosed evidence must create reasonable doubt about guilt which would not otherwise exist.

The prosecution's suppression of material evidence may violate due process even in the absence of a defense request for such evidence,¹ where the defense would have been materially aided by such evidence² or it was materially favorable,³ as where information is obviously exculpatory,⁴ and it is clearly supportive of a claim of innocence.⁵ Evidence is material if there is a reasonable possibility that it would constitute favorable evidence on the issue of guilt or innocence.⁶ Even if threshold materiality is apparent, a trial court need not impose sanctions unless defendant makes a showing of substantial materiality.⁷ Where no specific request has been made for exculpatory evidence in the possession of the prosecution,⁸ or if the request is general,⁹ in order to give rise to a due process violation, the undisclosed evidence must create a reasonable doubt about guilt which would not otherwise exist.

Where the prosecutor fails to disclose purely impeaching evidence not concerning a substantive issue, in the absence of a specific defense request, the materiality of the evidence required to establish a due process violation is whether there is a

reasonable probability that the undisclosed evidence would have produced an acquittal.¹⁰ However, it has also been held that where impeaching evidence is not disclosed, materiality depends upon whether the evidence would have created a reasonable doubt about guilt which would not otherwise exist.¹¹ Where only a general request for information is made, the burden is on defendant to establish that the failure to disclose is a denial of due process.¹²

In accordance with the above rules, in various instances, it has been held that defendant's due process rights have been violated¹³ while in many other cases, there has not been a violation of the defendant's due process rights.¹⁴

Deliberate concealment of material witness.

The deliberate concealment by the State of a material witness violates due process when the missing witness' testimony, circumstantially derived from and evaluated in the context of the entire record, would create a reasonable doubt of the defendant's guilt that did not otherwise exist.¹⁵ A good-faith effort on the part of the State to locate a witness whose disappearance was initially caused by the State does not remedy the constitutional error.¹⁶

CUMULATIVE SUPPLEMENT

Cases:

In determining whether undisclosed evidence violated Fifth Amendment due process, evidence is material when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *U.S. Const. Amend. 5. United States v. Dones-Vargas*, 936 F.3d 720 (8th Cir. 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); *Mallet v. Miller*, 432 F. Supp. 2d 366 (S.D. N.Y. 2006).
Cal.—*People v. Clark*, 52 Cal. 4th 856, 131 Cal. Rptr. 3d 225, 261 P.3d 243 (2011), application for writ of habeas corpus held in abeyance, 2013 WL 4500474 (E.D. Cal. 2013).
Ill.—*People v. Coleman*, 206 Ill. 2d 261, 276 Ill. Dec. 380, 794 N.E.2d 275 (2002).
Mass.—*Com. v. Bing Sial Liang*, 434 Mass. 131, 747 N.E.2d 112 (2001).
Miss.—*Simon v. State*, 857 So. 2d 668 (Miss. 2003).
R.I.—*State v. Ibrahim*, 862 A.2d 787 (R.I. 2004).
Wis.—*State v. Harris*, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737 (2004).
Duty to disclose extends to evidence known only to police and not to prosecutor.
Cal.—*People v. Salazar*, 35 Cal. 4th 1031, 29 Cal. Rptr. 3d 16, 112 P.3d 14 (2005).
Obligation of defense to make specific request
Defense counsel has an obligation to make a specific request for exculpatory evidence, and if the request is not specific, then the evidence must clearly be material in order for the prosecution to be required to disclose it, under the *Brady* due process duty to disclose material exculpatory evidence.
Pa.—*Com. v. Marinelli*, 570 Pa. 622, 810 A.2d 1257 (2002).
Perjured testimony

The prosecution's suppression of material evidence violates due process where the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury.

Ill.—*People v. Harris*, 206 Ill. 2d 1, 276 Ill. Dec. 419, 794 N.E.2d 314 (2002).

Conn.—*State v. Shaw*, 185 Conn. 372, 441 A.2d 561 (1981).

D.C.—*Brooks v. U. S.*, 396 A.2d 200 (D.C. 1978).

N.Y.—*People v. Geaslen*, 54 N.Y.2d 510, 446 N.Y.S.2d 227, 430 N.E.2d 1280 (1981).

Cal.—*People v. Superior Court*, 163 Cal. App. 4th 28, 77 Cal. Rptr. 3d 352 (5th Dist. 2008).

Tenn.—*State v. Biggs*, 218 S.W.3d 643 (Tenn. Crim. App. 2006).

U.S.—*Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

Va.—*Lovitt v. Warden*, 266 Va. 216, 585 S.E.2d 801 (2003).

Pa.—*Com. v. McGill*, 574 Pa. 574, 832 A.2d 1014 (2003).

Cal.—*People v. Bailes*, 129 Cal. App. 3d 265, 180 Cal. Rptr. 792 (5th Dist. 1982).

U.S.—*U.S. v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) (holding modified on other grounds by, *U.S. v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)); *U.S. v. Ramirez*, 608 F.2d 1261 (9th Cir. 1979).

Alaska—*Oksotkaruk v. State*, 611 P.2d 521 (Alaska 1980).

Fla.—*Mathis v. State*, 379 So. 2d 459 (Fla. 4th DCA 1980).

La.—*State v. Willie*, 410 So. 2d 1019 (La. 1982).

Mass.—*Com. v. Caillot*, 454 Mass. 245, 909 N.E.2d 1, 53 A.L.R.6th 633 (2009).

Minn.—*State v. Clark*, 296 N.W.2d 359 (Minn. 1980).

N.Y.—*People v. Handy*, 20 N.Y.3d 663, 966 N.Y.S.2d 351, 988 N.E.2d 879 (2013).

Pa.—*Com. v. Chamberlain*, 612 Pa. 107, 30 A.3d 381 (2011).

W. Va.—*State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982).

U.S.—*Illinois v. Fisher*, 540 U.S. 544, 124 S. Ct. 1200, 157 L. Ed. 2d 1060 (2004); *Ogle v. Estelle*, 641 F.2d 1122 (5th Cir. 1981).

Ill.—*People v. Ruffalo*, 69 Ill. App. 3d 532, 26 Ill. Dec. 490, 388 N.E.2d 114 (1st Dist. 1979).

Mass.—*Com. v. Caillot*, 454 Mass. 245, 909 N.E.2d 1, 53 A.L.R.6th 633 (2009).

Utah—*State v. Jarrell*, 608 P.2d 218 (Utah 1980).

U.S.—*Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); *Ogle v. Estelle*, 641 F.2d 1122 (5th Cir. 1981).

Cal.—*People v. Salazar*, 35 Cal. 4th 1031, 29 Cal. Rptr. 3d 16, 112 P.3d 14 (2005).

Pa.—*Com. v. Marinelli*, 570 Pa. 622, 810 A.2d 1257 (2002).

Va.—*Lovitt v. Warden*, 266 Va. 216, 585 S.E.2d 801 (2003).

U.S.—*U.S. ex rel. Smith v. Fairman*, 769 F.2d 386 (7th Cir. 1985).

Cal.—*People v. Hernandez*, 53 Cal. 4th 1095, 139 Cal. Rptr. 3d 606, 273 P.3d 1113 (2012).

U.S.—*U.S. v. Jackson*, 579 F.2d 553 (10th Cir. 1978).

N.Y.—*People v. Geaslen*, 54 N.Y.2d 510, 446 N.Y.S.2d 227, 430 N.E.2d 1280 (1981).

U.S.—*Cramer v. Fahner*, 683 F.2d 1376 (7th Cir. 1982).

Ill.—*People v. Cihlar*, 106 Ill. App. 3d 824, 62 Ill. Dec. 739, 436 N.E.2d 1041 (1st Dist. 1982).

Minn.—*State v. White*, 300 N.W.2d 176 (Minn. 1980).

R.I.—*State v. Bassett*, 447 A.2d 371 (R.I. 1982).

U.S.—*White v. Estelle*, 685 F.2d 927 (5th Cir. 1982).

U.S.—*White v. Estelle*, 685 F.2d 927 (5th Cir. 1982).

16C C.J.S. Constitutional Law § 1693

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

G. Disclosure and Discovery; Notice of Defense

§ 1693. Suppression of evidence—Performance of scientific and other tests

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4594(7)

It is a denial of due process to deprive defendant of the right to obtain at his or her own expense a scientific test for the purpose of establishing his or her innocence, but the Due Process Clause does not require that law enforcement agencies preserve breath samples of suspected drunk drivers in order for results of breath-analysis tests to be admissible in criminal prosecutions.

It is a denial of due process to deprive defendant of the right to obtain at his or her own expense a scientific test for the purpose of establishing his or her innocence.¹ Due process requires that criminal defendants have an opportunity to examine, and in appropriate cases have chemical tests performed on, evidence to be offered against them.² On the other hand, the right to due process does not include the right to be given a chemical sobriety test in all circumstances, and to hold otherwise would be to transform the accused's right to due process into a power to compel the State to gather on the accused's behalf what might be exculpatory evidence.³

However, although due process requires the State to allow the accused to have samples tested independently, the rule does not extend to situations in which the sample is necessarily consumed in the testing.⁴ In other words, the Due Process Clause places

no constraints on the good faith consumptive or destructive testing of evidence by the prosecution,⁵ and there is no violation for a failure to preserve it.⁶

When a test of the blood alcohol content of a driving while intoxicated suspect is required and a given reading level is an element as opposed to mere evidence of the offense, due process requires a second sample be obtained and preserved for the defendant's independent testing.⁷

Holding a prisoner incommunicado and unreasonably denying or ignoring his or her request for assistance to have chemical or other tests made, amounts to a denial of due process of law by thus suppressing possible evidence favorable to the defendant provided he or she can show specified circumstances.⁸

Where a defendant who claimed she acted in self defense after being raped had previously been offered, and had rejected a rape examination, it was not a violation of due process for the police not to require the examination since the fact of intercourse was not in issue.⁹

The police do not have a constitutional duty to perform any particular tests,¹⁰ and accordingly, due process is not violated because the State failed to perform a newer test on semen samples.¹¹

Blood test.

While there is no duty or obligation on law enforcement officers to administer a blood test, in no event may an officer frustrate the reasonable efforts of the defendant to obtain a timely sample of his or her own blood without denying defendant due process of law.¹²

The denial of a defendant's request for blood tests in order to challenge paternity in a prosecution for nonsupport violates due process.¹³

Where an entire sample of a specimen, such as blood, is, in good faith, consumed or destroyed during the testing process by a recognized law enforcement or other qualified laboratory, the consumption or destruction of the specimen does not constitute an act of suppression of evidence by the State sufficient to trigger a due process violation, warranting the suppression of the test results.¹⁴

The denial of an opportunity to procure a blood test on a charge of intoxication prevents the accused from obtaining evidence necessary to his or her defense and is a denial of due process of law.¹⁵

However, it has been held that a person who refuses a breathalyzer test may be denied a blood test without violating due process¹⁶ although there is authority to the contrary.¹⁷

Moreover, it has been held that the failure to inform a drunk driving defendant of his or her right to an independent test for intoxication did not deny defendant due process where he or she was not given a test for intoxication at the direction of a law enforcement officer.¹⁸

Due process is not violated where police officers fail to advise defendant of his or her right to obtain a portion of his or her blood sample for independent testing where the sample taken by the officers would still be available for testing at the time of the trial.¹⁹

Preservation of ampoule used in breathalyzer test.

The Supreme Court of United States has ruled that the Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples of suspected drunk drivers in order for results of breath-analysis test to be admissible in criminal prosecutions.²⁰ Also, numerous state courts have held that the ampoules, if preserved, would not be reliable or material as to the accused's guilt or innocence and, therefore, failure to preserve the ampoules would not constitute a denial of due process.²¹

As an alternative to preserving a breath sample, the State may notify defendant of his or her right to an independent test and assist defendant in obtaining one.²²

The failure of the State automatically to furnish the accused with a sample of his or her own breath for independent testing is not a denial of due process.²³

Prohibited substance.

In cases of possession or sale of a prohibited substance, where the outcome of the case is dependent on its identification as contraband, due process requires that analysis of the substance not be left completely within the province of the state²⁴ and that the substance be made available to the defendant for inspection and analysis;²⁵ however, such rule applies only where the State has some of the substance in question in its possession.²⁶

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Footnotes

- 1 Ariz.—*State v. Jefferson*, 126 Ariz. 341, 615 P.2d 638 (1980).
- 2 Cal.—*People v. Backus*, 23 Cal. 3d 360, 152 Cal. Rptr. 710, 590 P.2d 837 (1979).
Wis.—*State v. Disch*, 119 Wis. 2d 461, 351 N.W.2d 492 (1984).
Indigents and independent blood test
Indigent defendant had no due process right to independent blood test at State's expense, in prosecution for driving under the influence of intoxicating liquor (DUI).
Wis.—*State v. Benoir*, 174 Vt. 632, 819 A.2d 699 (2002).
A.L.R. Library
Failure of State Prosecutor to Disclose Exculpatory Medical Reports and Tests as Violating Due Process, 101 A.L.R.5th 187.
- 3 Ind.—*Barber v. State*, 911 N.E.2d 641 (Ind. Ct. App. 2009).
- 4 Ariz.—*State v. Lehr*, 227 Ariz. 140, 254 P.3d 379 (2011).
Conn.—*State v. Thompson*, 128 Conn. App. 296, 17 A.3d 488 (2011).
Sperm sample
Okla.—*Sadler v. State*, 1993 OK CR 2, 846 P.2d 377 (Okla. Crim. App. 1993).
- 5 U.S.—*Kowalak v. Scutt*, 712 F. Supp. 2d 657 (E.D. Mich. 2010).
- 6 Cal.—*People v. Houston*, 130 Cal. App. 4th 279, 29 Cal. Rptr. 3d 818 (1st Dist. 2005).
- 7 N.H.—*Opinion of the Justices*, 131 N.H. 583, 557 A.2d 1355 (1989).
- 8 Miss.—*Scarborough v. State*, 261 So. 2d 475 (Miss. 1972).
- 9 Colo.—*People v. Wagner*, 725 P.2d 51 (Colo. App. 1986).
- 10 U.S.—*Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).
N.C.—*State v. Wright*, 210 N.C. App. 52, 708 S.E.2d 112 (2011).
- 11 U.S.—*Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).
PGM enzyme testing

- U.S.—*Mitchell v. Goldsmith*, 878 F.2d 319 (9th Cir. 1989).
- 12 Cal.—*Brown v. Municipal Court*, 86 Cal. App. 3d 357, 150 Cal. Rptr. 216 (2d Dist. 1978).
- S.C.—*State v. Lewis*, 266 S.C. 45, 221 S.E.2d 524 (1976).
- 13 Mo.—*State v. Hoy*, 742 S.W.2d 206 (Mo. Ct. App. W.D. 1987).
- 14 N.J.—*State v. Kaye*, 176 N.J. Super. 484, 423 A.2d 1002 (App. Div. 1980).
- A.L.R. Library**
Consumption or destruction of physical evidence due to testing or analysis by prosecution's expert as warranting suppression of evidence or dismissal of case against accused in state court, 40 A.L.R.4th 594.
- 15 Alaska—*State, Dept. of Public Safety v. Shakespeare*, 4 P.3d 322 (Alaska 2000).
- Cal.—*Brown v. Municipal Court*, 86 Cal. App. 3d 357, 150 Cal. Rptr. 216 (2d Dist. 1978).
- A.L.R. Library**
Authentication of blood sample taken from human body for purposes of determining blood alcohol content, 76 A.L.R.5th 1.
- 16 S.D.—*State v. Zoss*, 360 N.W.2d 523 (S.D. 1985).
- 17 Ariz.—*Smith v. Cada*, 114 Ariz. 510, 562 P.2d 390 (Ct. App. Div. 1 1977).
- 18 Ark.—*Patrick v. State*, 295 Ark. 473, 750 S.W.2d 391 (1988).
- 19 Ariz.—*State v. Kemp*, 168 Ariz. 334, 813 P.2d 315 (1991).
- 20 U.S.—*California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).
- Okla.—*McClure v. ConocoPhillips Co.*, 2006 OK 42, 142 P.3d 390 (Okla. 2006).
- As to admission in evidence of results of breathalyzer test, see § 1661.
- 21 Fla.—*State v. Phillipe*, 402 So. 2d 33 (Fla. 3d DCA 1981).
- N.Y.—*People v. LePree*, 105 Misc. 2d 1066, 430 N.Y.S.2d 778 (N.Y. City Ct. 1980).
- Tex.—*Turpin v. State*, 606 S.W.2d 907 (Tex. Crim. App. 1980).
- Wis.—*State v. Walstad*, 119 Wis. 2d 483, 351 N.W.2d 469 (1984).
- 22 Alaska—*Gundersen v. Municipality of Anchorage*, 792 P.2d 673 (Alaska 1990).
- 23 Kan.—*State v. Young*, 228 Kan. 355, 614 P.2d 441 (1980).
- 24 Ga.—*Morris v. State*, 324 Ga. App. 756, 751 S.E.2d 551 (2013), cert. denied, (Mar. 28, 2014).
- 25 Miss.—*Poole v. State*, 291 So. 2d 723 (Miss. 1974).
- 26 Miss.—*Poole v. State*, 291 So. 2d 723 (Miss. 1974).

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16C C.J.S. Constitutional Law § 1694

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

G. Disclosure and Discovery; Notice of Defense

§ 1694. Destruction or loss of evidence

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4594(8)

In a criminal prosecution, the destruction or loss of evidence by the government may constitute a denial of due process where such evidence is material to guilt or innocence or favorable to the defendant, the State acts in bad faith, and the defendant is prejudiced by the destruction or loss of the evidence.

In a criminal prosecution, the destruction¹ or loss² of favorable or material evidence by either the police or the prosecutor may constitute a denial of due process. Where evidence is destroyed or lost, special scrutiny must be employed in ascertaining whether a due process violation has occurred.³ To establish a violation of the Due Process Clause, the destroyed or lost evidence must be material to guilt or innocence or favorable to the defendant,⁴ or there must be a reasonable possibility that the evidence would have been favorable and material to his or her defense⁵ and which would have created a reasonable doubt about defendant's guilt that would not otherwise exist.⁶ In addition, there must be bad faith on the part of the prosecution,⁷ and the defendant must be prejudiced by the destruction or loss of the evidence.⁸ The presence or absence of bad faith by the prosecution depends on whether agents of the State had knowledge of the exculpatory value of the evidence when it was lost or destroyed.⁹

Due process only requires preservation of material evidence, not the creation of new evidence.¹⁰

The failure of the police to preserve potentially useful evidence is not a denial of due process of law unless the defendant can show bad faith on the part of the police.¹¹

Some courts have broadly stated that the *Brady rule*, i.e., that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution, as discussed in § 1691, applies equally to a case involving the destruction or loss of evidence.¹² Where the evidence is destroyed, thus rendering proof of its exculpatory nature impossible, the inability of the defendant to show that the destroyed evidence was exculpatory does not alone defeat the claim that its destruction and nondisclosure by the prosecution denied the defendant due process of law given the showing that the evidence was clearly material to the issue of guilt or innocence.¹³ Where a court destroys tape recordings and accompanying notes from a defendant's trial pursuant to a court administrative rule 10 years after the date they were recorded, and where defendant flees from jurisdiction resulting in a delay of more than 10 years between conviction and sentencing, the destruction of the tape recording and notes from the trial does not deprive the defendant of his or her state or federal constitutional right to due process of law.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

Prosecution's failure to preserve evidence resulting from mere negligence does not violate due process. [U.S. Const. Amend. 14](#). [Jimerson v. Payne](#), 957 F.3d 916 (8th Cir. 2020).

Neither federal government nor state police destroyed heroin seized from defendants' rental car in bad faith, and thus destruction of evidence did not violate defendants' due process rights, in federal drug-related prosecution; state police destroyed heroin after routine check revealed that state charges against defendants had been dismissed, and state's case management system mistakenly failed to flag that federal case against defendants continued. [U.S. Const. Amend. 5](#); Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406, 21 U.S.C.A. §§ 841, 846. [United States v. Burnett](#), 827 F.3d 1108 (D.C. Cir. 2016).

Destroyed shell casings from another shooting that occurred within hours of victim's murder and that was part of other crimes evidence constituted potentially useful evidence, as opposed to materially exculpatory evidence, and therefore their destruction did not violate defendant's due process rights absent a showing of bad faith on the part of State, despite claim that loss of casings deprived defendant of opportunity to test casings and contradict State's expert testimony that casings came from the same firearm; casings did not have exculpatory value that was apparent before the evidence was destroyed. [U.S.C.A. Const. Amend. 14](#); Rules of Evid., Rule 404(b). [Bishop v. State](#), 40 N.E.3d 935 (Ind. Ct. App. 2015), transfer denied, 40 N.E.3d 858 (Ind. 2015).

Destruction of recordings of police radio communications regarding traffic stop involving defendant did not violate defendant's right to due process or rule requiring prosecution to provide exculpatory evidence to defense, although defendant's attorney sent letter requesting that prosecution assist in preserving recordings; recordings were destroyed after 90 days in accordance with police policy, neither prosecution nor police agencies wilfully destroyed recordings, and recordings had no probative value. [U.S. Const. Amend. 14](#); Md. Rule 4-263(d). [Steck v. State](#), 239 Md. App. 440, 197 A.3d 531 (2018).

Absent a showing of bad faith on part of state, defendant could not establish that state's failure to preserve dash camera footage from vehicle of state trooper who pulled defendant over for various traffic violations constituted a *Brady* violation for purposes of defendant's prosecution for felony habitual impaired driving, where there was no actual record of what footage may have shown, making footage only potentially useful to defendant. [U.S. Const. Amend. 14](#); N.C. Const. art. 1, §§ 19, 23. [State v. Taylor](#), 836 S.E.2d 658 (N.C. Ct. App. 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1

[Ariz.—State v. Nelson](#), 129 Ariz. 582, 633 P.2d 391 (1981).
[Colo.—People v. Holloway](#), 649 P.2d 318 (Colo. 1982).
[N.M.—State v. Hill](#), 144 N.M. 775, 2008-NMCA-117, 192 P.3d 770 (Ct. App. 2008).
[Or.—State v. Lance](#), 48 Or. App. 141, 616 P.2d 546 (1980).
[Wash.—In re Woods](#), 154 Wash. 2d 400, 114 P.3d 607 (2005).
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[N.H.—State v. Lavoie](#), 152 N.H. 542, 880 A.2d 432 (2005).
[Wash.—State v. Gilcrist](#), 91 Wash. 2d 603, 590 P.2d 809 (1979).
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[U.S.—U.S. v. Hoppe](#), 645 F.2d 630, 8 Fed. R. Evid. Serv. 181 (8th Cir. 1981).
[Idaho—State v. Albright](#), 110 Idaho 748, 718 P.2d 1186 (1986).
[Iowa—State v. Steadman](#), 350 N.W.2d 172 (Iowa 1984).
[Miss.—Irby v. State](#), 893 So. 2d 1042 (Miss. 2004).
[Nev.—Wood v. State](#), 97 Nev. 363, 632 P.2d 339 (1981).
[N.D.—State v. Thill](#), 2005 ND 13, 691 N.W.2d 230 (N.D. 2005).
[Wash.—State v. Boyd](#), 29 Wash. App. 584, 629 P.2d 930 (Div. 1 1981).
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[Cal.—People v. Nation](#), 26 Cal. 3d 169, 161 Cal. Rptr. 299, 604 P.2d 1051 (1980).
[Ill.—People v. Huffman](#), 81 Ill. App. 3d 901, 37 Ill. Dec. 118, 401 N.E.2d 1211 (1st Dist. 1980).
[N.D.—State v. Larson](#), 313 N.W.2d 750 (N.D. 1981).
[Tex.—Baker v. State](#), 887 S.W.2d 227 (Tex. App. Texarkana 1994).
[Wash.—State v. Boyd](#), 29 Wash. App. 584, 629 P.2d 930 (Div. 1 1981).
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[Alaska—Williams v. State](#), 629 P.2d 54 (Alaska 1981).
[Fla.—State v. Davis](#), 14 So. 3d 1130 (Fla. 4th DCA 2009).
[Wash.—State v. Nerison](#), 28 Wash. App. 659, 625 P.2d 735 (Div. 2 1981).
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[U.S.—U.S. v. Miranne](#), 688 F.2d 980 (5th Cir. 1982).
[Fla.—State v. Buitrago](#), 39 So. 3d 540 (Fla. 2d DCA 2010).
[Ill.—People v. Nunn](#), 2014 IL App (3d) 120614, 388 Ill. Dec. 103, 24 N.E.3d 11 (App. Ct. 3d Dist. 2014).
[Miss.—Cox v. State](#), 849 So. 2d 1257 (Miss. 2003).
[N.D.—State v. Thill](#), 2005 ND 13, 691 N.W.2d 230 (N.D. 2005).
[Tex.—Ramirez v. State](#), 301 S.W.3d 410 (Tex. App. Austin 2009).
[Utah—State v. Gulbransen](#), 2005 UT 7, 106 P.3d 734 (Utah 2005).
[Wash.—In re Woods](#), 154 Wash. 2d 400, 114 P.3d 607 (2005).
Act in good faith
 In prosecution for capital murder, defendant was not denied due process of law by State's destruction of DNA evidence where no evidence suggested that police acted in bad faith in destroying DNA evidence, and rape kit containing DNA evidence was destroyed after container containing vaginal swab leaked and contaminated the evidence.
- 8

[La.—State v. Harris](#), 892 So. 2d 1238 (La. 2005).
[U.S.—U.S. v. Hoppe](#), 645 F.2d 630, 8 Fed. R. Evid. Serv. 181 (8th Cir. 1981).
[Ariz.—State v. Nelson](#), 129 Ariz. 582, 633 P.2d 391 (1981).
[Cal.—People v. Pedroza](#), 126 Cal. App. 3d 498, 179 Cal. Rptr. 64 (2d Dist. 1981).
[Ga.—Speight v. State](#), 159 Ga. App. 5, 282 S.E.2d 651 (1981).
[Idaho—State v. Bennett](#), 142 Idaho 166, 125 P.3d 522 (2005).
[Ind.—Osborne v. State](#), 426 N.E.2d 20 (Ind. 1981).
[Nev.—Baccari v. State](#), 97 Nev. 109, 624 P.2d 1008 (1981).
[N.J.—George v. City of Newark](#), 384 N.J. Super. 232, 894 A.2d 690 (App. Div. 2006).
[N.M.—State v. Lucero](#), 96 N.M. 126, 1981-NMCA-056, 628 P.2d 696 (Ct. App. 1981).
[Tex.—Sanders v. State](#), 387 S.W.3d 680 (Tex. App. Texarkana 2012).

- 9 U.S.—*Moldowan v. City of Warren*, 578 F.3d 351 (6th Cir. 2009); U.S. v. *Zaragoza-Moreira*, 780 F.3d 971 (9th Cir. 2015); U.S. v. *Figueroa-Quinones*, 21 F. Supp. 3d 138 (D.P.R. 2014).
 Fla.—*Dufour v. State*, 905 So. 2d 42 (Fla. 2005).
 Va.—*Lovitt v. Warden*, 266 Va. 216, 585 S.E.2d 801 (2003).
- 10 Wash.—*State v. Spurgeon*, 63 Wash. App. 503, 820 P.2d 960 (Div. 1 1991).
- 11 U.S.—*Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988); *Burton v. St. Louis Bd. of Police Com'rs*, 731 F.3d 784 (8th Cir. 2013).
 Cal.—*People v. Duff*, 58 Cal. 4th 527, 167 Cal. Rptr. 3d 615, 317 P.3d 1148 (2014).
 D.C.—*Koonce v. District of Columbia*, 111 A.3d 1009 (D.C. 2015).
No due process violation where police destroyed evidence in good faith and in accordance with normal practice or court administrative rule
 U.S.—*Illinois v. Fisher*, 540 U.S. 544, 124 S. Ct. 1200, 157 L. Ed. 2d 1060 (2004).
 Haw.—*State v. Jenkins*, 93 Haw. 87, 997 P.2d 13 (2000).
Bad faith alone
 Where the State fails to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant, there is no due process violation unless the defendant shows bad faith on the part of the State.
 Kan.—*State v. LaMae*, 268 Kan. 544, 998 P.2d 106 (2000).
- 12 N.D.—*State v. Larson*, 313 N.W.2d 750 (N.D. 1981).
 S.D.—*State v. Charles*, 2001 SD 67, 628 N.W.2d 734 (S.D. 2001).
- 13 Iowa—*State v. Brown*, 337 N.W.2d 507 (Iowa 1983) (rejected by, *State v. Huettl*, 379 N.W.2d 298 (S.D. 1985)).
 S.D.—*State v. Parker*, 263 N.W.2d 679 (S.D. 1978).
- 14 N.H.—*State v. Brenes*, 151 N.H. 11, 846 A.2d 1211 (2004).

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16C C.J.S. Constitutional Law § 1695

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Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

G. Disclosure and Discovery; Notice of Defense

§ 1695. Notice of alibi or insanity defense

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4593 to 4597

Due process forbids the enforcement of rules requiring a defendant to give notice of an alibi defense unless reciprocal discovery rights are given to the defendant.

Due process forbids the enforcement of rules requiring a defendant to give notice of an alibi defense unless reciprocal discovery rights are given to the defendant.¹ Accordingly, where reciprocal discovery rights are granted, there is no violation of due process,² but where such reciprocal rights are lacking, due process is generally violated.³ However, depending on the circumstances of the case, not every failure to give reciprocal discovery denies due process of law,⁴ as where it is not established that the identity of an alibi witness is produced as a result of the defendant's disclosure of the alibi defense.⁵ The statute which requires notice of an alibi defense does not violate due process requirements because it fails to require the prosecutor to state the date, time, and place of an offense, but it requires defendant to state specific information as to his or her whereabouts at the time of the offense.⁶

A state cannot, under the Due Process Clause, force compliance with its notice of alibi statute on the basis of a totally unsubstantiated possibility that the statute might be read in a manner contrary to its plain language, which afforded no reciprocal discovery rights.⁷ Thus, in the absence of fair notice that defendant would have an opportunity to discover the State's rebuttal

witnesses, defendant could not, consistent with due process, be required to reveal his or her alibi defense pursuant to the state statute.⁸

Due process requires the prosecution to reveal its alibi rebuttal witnesses when the defendant indicates an intention to call alibi witnesses and reveals their identities to the prosecution.⁹ Furthermore, due process requires that the state rebuttal witnesses not be permitted to testify in situations where defendant has disclosed that he or she intends to rely on an alibi defense and has disclosed his or her witnesses, and the State has failed to disclose the names of the persons called to rebut the alibi defense.¹⁰ Where the State's rebuttal witness is not called to rebut an alibi defense, the State is not required, as a matter of constitutional due process, to give advance notice of the rebuttal witnesses even though defendant has been required, under the rules of criminal procedure, to make a prior disclosure of his or her alibi defense and alibi witnesses as well as all other witnesses whom he or she intended to call.¹¹ Thus, due process does not require a prosecutor to divulge his or her alibi rebuttal witnesses during pretrial proceedings, on pain of not being permitted to present those witnesses, as this would require that the prosecutor base his or her disclosures on little more than speculations about what might happen at trial.¹²

A statute requiring defendant to give notice to the prosecution within a specified time if he or she intends to raise an alibi defense does not deny due process.¹³

Intent to plead insanity.

A statute requiring that defendant give notice to the State of his or her intent to plead insanity as a defense does not unlawfully encroach on defendant's lawful presumption of innocence so as to constitute a violation of the Due Process Clause,¹⁴ and the defendant's due process rights are not violated by the failure of a statute, requiring defendant to disclose his or her intent to raise an insanity defense, to require reciprocal discovery from the State where defendant does not show that he or she is impeded in any way in preparing or presenting an insanity defense by such failure.¹⁵

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Footnotes

- 1 U.S.—*Wardius v. Oregon*, 412 U.S. 470, 93 S. Ct. 2208, 37 L. Ed. 2d 82 (1973).
Kan.—*Talley v. State*, 222 Kan. 289, 564 P.2d 504 (1977).
Or.—*State v. Frye*, 34 Or. App. 871, 581 P.2d 528 (1978).
- 2 U.S.—*Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970); *Bruce v. Duckworth*, 659 F.2d 776 (7th Cir. 1981).
Ind.—*Bowen v. State*, 263 Ind. 558, 334 N.E.2d 691 (1975).
N.M.—*State v. Smith*, 88 N.M. 541, 1975-NMCA-139, 543 P.2d 834 (Ct. App. 1975).
List of witnesses
State's initial failure to provide capital murder defendant with names of 43 inmates who gave statements concerning prison riot during which murders occurred, or its refusal to provide full text of inmates' statements, did not implicate defendant's right to due process where many statements identified defendant as a participant in murders and none of the statements assisted defendant's alibi defense.
Ohio—*State v. LaMar*, 95 Ohio St. 3d 181, 2002-Ohio-2128, 767 N.E.2d 166 (2002).
- 3 U.S.—*Wardius v. Oregon*, 412 U.S. 470, 93 S. Ct. 2208, 37 L. Ed. 2d 82 (1973).
Kan.—*Talley v. State*, 222 Kan. 289, 564 P.2d 504 (1977).
- 4 U.S.—*U. S. ex rel. Smith v. Brierton*, 424 F. Supp. 364 (N.D. Ill. 1976).
- 5 U.S.—*U. S. ex rel. Smith v. Brierton*, 424 F. Supp. 364 (N.D. Ill. 1976).
Ill.—*People v. Stinson*, 37 Ill. App. 3d 229, 345 N.E.2d 751 (1st Dist. 1976).
- 6 Mich.—*People v. Sherrod*, 32 Mich. App. 183, 188 N.W.2d 221 (1971).
- 7 U.S.—*Wardius v. Oregon*, 412 U.S. 470, 93 S. Ct. 2208, 37 L. Ed. 2d 82 (1973).

- 8 U.S.—*Wardius v. Oregon*, 412 U.S. 470, 93 S. Ct. 2208, 37 L. Ed. 2d 82 (1973).
9 Mo.—*State v. Umfleet*, 587 S.W.2d 612 (Mo. Ct. App. E.D. 1979).
10 Mo.—*State v. Curtis*, 544 S.W.2d 580 (Mo. 1976).
11 Ariz.—*State v. LaBarre*, 115 Ariz. 444, 565 P.2d 1305 (Ct. App. Div. 1 1977).
12 N.Y.—*People v. Lenihan*, 30 Misc. 3d 289, 911 N.Y.S.2d 588 (Sup 2010).
13 Mich.—*People v. Jackson*, 71 Mich. App. 395, 249 N.W.2d 132 (1976).
14 Ind.—*Thomas v. State*, 420 N.E.2d 1216 (Ind. 1981).
15 U.S.—*Green v. Fogg*, 422 F. Supp. 1034 (S.D. N.Y. 1976).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

H. Time of Trial and Continuances

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16C C.J.S. Constitutional Law § 1696

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

H. Time of Trial and Continuances

§ 1696. Right to speedy trial

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4561, 4612

The right to a speedy trial guaranteed by the Sixth Amendment to the United States Constitution is encompassed within the Due Process Clause of the Fourteenth Amendment and is thus applicable in state criminal prosecutions. To obtain relief under the clause, defendant must show that the delay caused actual and substantial prejudice to his or her right to a fair trial.

The right to a speedy trial guaranteed by the Sixth Amendment to the United States Constitution is encompassed within the Due Process Clause of the Fourteenth Amendment and is thus applicable in state criminal cases.¹ The due process right to a speedy trial relates to the period of time between the date of the occurrence of the alleged offense and the date when defendant is accused of committing the crime, and defendant becomes accused of the crime for this purpose when he or she is either arrested or indicted, whichever occurs first.² Because of statutory safeguards in the form of statutes of limitations, the Due Process Clause has a limited role to play in protecting against the oppressive delay.³ The Fifth Amendment right to due process is not implicated by postindictment delay, which falls within the purview of the Sixth Amendment right to speedy trial.⁴

The due process claims with respect to the denial of a speedy trial are evaluated on a case-by-case basis.⁵ The determination of the question of due process in a denial of a speedy trial involves the use of balancing tests,⁶ such as balancing of the justification

for the delay against the prejudice to the accused,⁷ and the consideration of several factors,⁸ including the length of the delay, the reason for the delay, the degree of actual prejudice to defendant, and the waiver by defendant.⁹ Also, to be considered are the seriousness of the underlying offense¹⁰ and whether defendant asserted the right to a speedy trial.¹¹

The due process requires that when a person makes a demand for speedy trial, the prosecutor must make a diligent, good-faith effort to bring him or her to trial.¹² To establish a denial of due process on the ground of the lack of a speedy trial, defendant must show something in addition to mere lapse of time between the time of his or her arrest and the date the trial commenced.¹³ A defendant must show that the delay caused actual, substantial, or severe prejudice to his or her right to a fair trial,¹⁴ such as impairment of his or her ability to present an effective defense.¹⁵ Definite, specific, and not potential or speculative prejudice is required,¹⁶ where there is no prejudice resulting from the delay, the due process claims of the denial of a fair trial because of the prosecutorial delay are speculative and premature.¹⁷ However, an unreasonable delay of trial can so prejudice defendant as to violate his or her due process rights.¹⁸

A delay in trial without actual prejudice to defendant can nonetheless violate due process but only where other factors exist aside from prejudice.¹⁹ The court may determine whether there was a purposeful and oppressive government conduct²⁰ and whether the delay was an intentional device to gain a tactical advantage over the accused.²¹

Where there is no excessive delay²² or prejudice,²³ defendant's due process rights are not violated. There is no denial of due process to a speedy trial where the delay is due to a good cause,²⁴ but the absence from the state because of the incarceration elsewhere does not constitute good cause for a delay.²⁵ Due process is not denied where the delay is for mere purpose of more efficient law enforcement,²⁶ where the delay can be explained by the exigencies of investigative and indictment processes,²⁷ or where prosecutorial delay, not barred by the statute of limitations, is solely for the purpose of insuring the most fully developed view of the law, at the time of trial.²⁸

Defendant is not denied due process of law on the ground of the delay in the prosecution where the delay is caused by defendant's actions²⁹ or by defendant's mental incompetency to stand trial.³⁰

Expeditious trial.

In the absence of the denial of some constitutionally protected rights, courts do not deny due process merely because they act expeditiously.³¹

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Footnotes

- 1 U.S.—*Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); *Divers v. Cain*, 698 F.3d 211 (5th Cir. 2012), cert. denied, 133 S. Ct. 1806, 185 L. Ed. 2d 826 (2013).
Cal.—*People v. McDowell*, 54 Cal. 4th 395, 143 Cal. Rptr. 3d 215, 279 P.3d 547 (2012).
Kan.—*State v. Pressley*, 290 Kan. 24, 223 P.3d 299 (2010).
La.—*State v. Pierre*, 146 So. 3d 681 (La. Ct. App. 4th Cir. 2014).
Md.—*Collins v. State*, 192 Md. App. 192, 993 A.2d 1175 (2010).
Utah—*State v. Younge*, 2013 UT 71, 321 P.3d 1127 (Utah 2013).
- 2 U.S.—*U.S. v. McLemore*, 447 F. Supp. 1229 (E.D. Mich. 1978).
Fla.—*Giglio v. Kaplan*, 392 So. 2d 1004 (Fla. 4th DCA 1981).

N.C.—*State v. Watson*, 51 N.C. App. 369, 276 S.E.2d 732 (1981).

As to prearrest delay as a violation of due process, see § 1630.

As to preindictment delay, see § 1638.

Defendant may challenge delay both before and after official accusation

U.S.—*Doggett v. U.S.*, 505 U.S. 647, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).

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Application of speedy trial statute to dismissal or other termination of prior indictment or information and bringing of new indictment or information, 39 A.L.R.4th 899.

U.S.—*Arnold v. McCarthy*, 566 F.2d 1377 (9th Cir. 1978).

Ga.—*Higgenbottom v. State*, 290 Ga. 198, 719 S.E.2d 482 (2011).

Ill.—*People v. Leavitt*, 2014 IL App (1st) 121323, 387 Ill. Dec. 385, 22 N.E.3d 430 (App. Ct. 1st Dist. 2014).

As to the right to a speedy trial in criminal cases, generally, see C.J.S., Criminal Law §§ 828 to 875.

U.S.—*U. S. ex rel. Sims v. Sielaff*, 563 F.2d 821 (7th Cir. 1977).

N.Y.—*People v. Best*, 83 A.D.2d 881, 442 N.Y.S.2d 109 (2d Dep't 1981).

Wash.—*McQueary v. State*, 21 Wash. App. 658, 585 P.2d 1197 (Div. 3 1978).

U.S.—*U.S. v. Librach*, 520 F.2d 550 (8th Cir. 1975).

Cal.—*People v. Hayton*, 95 Cal. App. 3d 413, 156 Cal. Rptr. 426 (1st Dist. 1979).

Analysis employed

The due process analysis for unreasonable delay in bringing a defendant to trial generally follows the test for determining whether the right to a speedy trial was violated, requiring the court to balance the length of the delay, the reason for the delay, defendant's assertion of his or her right, and prejudice to defendant.

Nev.—*Prince v. State*, 118 Nev. 634, 55 P.3d 947 (2002).

Liberty or property interest

For due process purposes, a local court rule requiring a written waiver of a defendant's right to a speedy trial does not create a liberty or property interest.

Kan.—*State v. Bloom*, 273 Kan. 291, 44 P.3d 305 (2002).

Wash.—*McQueary v. State*, 21 Wash. App. 658, 585 P.2d 1197 (Div. 3 1978).

U.S.—*U.S. v. Titus*, 576 F.2d 210 (9th Cir. 1978).

Miss.—*Smith v. State*, 835 So. 2d 927 (Miss. 2002).

N.Y.—*People v. Best*, 83 A.D.2d 881, 442 N.Y.S.2d 109 (2d Dep't 1981).

Or.—*State v. Ivory*, 278 Or. 499, 564 P.2d 1039 (1977).

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When does delay in imposing sentence violate speedy trial provision, 86 A.L.R.4th 340.

N.Y.—*People v. Best*, 83 A.D.2d 881, 442 N.Y.S.2d 109 (2d Dep't 1981).

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D.C.—*Bradley v. U.S.*, 856 A.2d 1157 (D.C. 2004).

Ill.—*People v. Schultz*, 99 Ill. App. 3d 762, 55 Ill. Dec. 94, 425 N.E.2d 1267 (3d Dist. 1981).

Me.—*State v. Goodall*, 407 A.2d 268 (Me. 1979).

R.I.—*State v. Crescenzo*, 118 R.I. 662, 375 A.2d 933 (1977).

U.S.—*U.S. v. Dennis*, 625 F.2d 782, 6 Fed. R. Evid. Serv. 454 (8th Cir. 1980) (rejected on other grounds by, *U.S. v. Hawkins*, 765 F.2d 1482 (11th Cir. 1985)).

Fla.—*State v. Wallace*, 401 So. 2d 863 (Fla. 1st DCA 1981).

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U.S.—*U.S. v. Taylor*, 469 F.2d 284 (3d Cir. 1972).

Conn.—*State v. Echols*, 170 Conn. 11, 364 A.2d 225 (1975).

U.S.—*U.S. v. Marion*, 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971).

U.S.—*U.S. v. Napue*, 401 F.2d 107 (7th Cir. 1968); *Beasley v. Pitchess*, 358 F.2d 706 (9th Cir. 1966).

Tenn.—*State v. Baker*, 614 S.W.2d 352 (Tenn. 1981).

- 19 N.Y.—*People v. Best*, 83 A.D.2d 881, 442 N.Y.S.2d 109 (2d Dep't 1981).
- 20 U.S.—*Saiz v. Eyman*, 446 F.2d 884 (9th Cir. 1971).
- N.C.—*State v. Lynch*, 300 N.C. 534, 268 S.E.2d 161 (1980).
- 21 U.S.—*U.S. v. Dennis*, 625 F.2d 782, 6 Fed. R. Evid. Serv. 454 (8th Cir. 1980) (rejected on other grounds by, *U.S. v. Hawkins*, 765 F.2d 1482 (11th Cir. 1985)).
- Cal.—*People v. Horning*, 34 Cal. 4th 871, 22 Cal. Rptr. 3d 305, 102 P.3d 228 (2004).
- Ill.—*People v. Sanders*, 86 Ill. App. 3d 457, 41 Ill. Dec. 453, 407 N.E.2d 951 (1st Dist. 1980).
- 22 U.S.—*Cooper v. Mitchell*, 647 F.2d 437 (4th Cir. 1981).
- Mo.—*State v. Strong*, 484 S.W.2d 657 (Mo. 1972).
- 23 U.S.—*Gable v. Massey*, 566 F.2d 459 (5th Cir. 1978).
- Miss.—*Jones v. State*, 306 So. 2d 57 (Miss. 1975).
- 24 Okla.—*Countryman v. State*, 1977 OK CR 327, 572 P.2d 294 (Okla. Crim. App. 1977).
- Good-faith delay**
A determination made in good faith to delay a prosecution for sufficient reasons will not deprive a defendant of due process even though there may be some prejudice to defendant.
- N.Y.—*People v. Vernace*, 96 N.Y.2d 886, 730 N.Y.S.2d 778, 756 N.E.2d 66 (2001).
- 25 S.D.—*State v. Opheim*, 84 S.D. 227, 169 N.W.2d 716 (1969).
- 26 Cal.—*People v. Avila*, 253 Cal. App. 2d 308, 61 Cal. Rptr. 441 (1st Dist. 1967) (disapproved of on other grounds by, *Eleazer v. Superior Court*, 1 Cal. 3d 847, 83 Cal. Rptr. 586, 464 P.2d 42 (1970)).
- 27 U.S.—*U.S. v. Lewis*, 433 F.2d 1146 (D.C. Cir. 1970).
- 28 U.S.—*U.S. v. Evers*, 552 F.2d 1119 (5th Cir. 1977).
- 29 U.S.—*U.S. v. Bizzard*, 674 F.2d 1382, 10 Fed. R. Evid. Serv. 687 (11th Cir. 1982).
- Cal.—*People v. Gasteiger*, 129 Cal. App. 3d 152, 180 Cal. Rptr. 704 (2d Dist. 1982).
- Mont.—*State v. Freeman*, 183 Mont. 334, 599 P.2d 368 (1979).
- 30 U.S.—*U. S. ex rel. Little v. Twomey*, 477 F.2d 767 (7th Cir. 1973).
- Minn.—*State v. Bauer*, 299 N.W.2d 493 (Minn. 1980).
- 31 U.S.—*Eubanks v. U.S.*, 336 F.2d 269 (9th Cir. 1964).
- N.Y.—*People v. Peterson*, 91 Misc. 2d 407, 398 N.Y.S.2d 24 (Sup 1977).

16C C.J.S. Constitutional Law § 1697

Corpus Juris Secundum | June 2021 Update

Constitutional Law

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

H. Time of Trial and Continuances

§ 1697. Time for preparation of defense

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  4611.

Due process requires that every defendant and his or her counsel be allowed a reasonable time and an opportunity to investigate, prepare, and present his or her case; however, no set length of time is guaranteed, and whether defendant is denied due process must be determined under the circumstances of each case.

Due process requires that every defendant and his or her counsel be allowed a reasonable time and an opportunity to investigate, prepare, and present his or her case.¹ However, no set length of time is guaranteed, and whether defendant is denied due process must be determined under the circumstances of each case.² The interest toward which the Due Process Clause is directed in regard to a delay-of-prosecution claim is defendant's interest in the fairness of the trial itself, and defendant who seeks to avail himself or herself of its protection must show actual prejudice to that interest.³ The fact that a written waiver of a specified trial preparation period required by state law is not executed does not per se rise to a deprivation of due process.⁴

Where an unreasonable delay in bringing defendant to trial is shown to have impaired defendant's ability to defend himself or herself, there may be a denial of due process which precludes the prosecution.⁵ Also, when there is a reasonable possibility that the jury could have reached a different result by considering the asserted evidence foreclosed by the delay between the

commission of the crime and the trial, defendant has been denied due process.⁶ The preparation of the defense may not without violation of due process be postponed indefinitely until the state has completed its case.⁷

In particular instances, it has been held that the amount of time allowed to defendant before and during the trial, or the facilities available to him or her, to prepare a defense were not so inadequate as to deny defendant due process of law,⁸ and that defendant was not denied due process of law by virtue of speed with which the prosecution proceeded, despite the contention that an early hearing deprived defendant of the opportunity to prepare himself or herself for trial.⁹

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Footnotes

- 1 U.S.—*Watson v. Jago*, 558 F.2d 330, 8 Ohio Op. 3d 307 (6th Cir. 1977).
 Mont.—*State v. Garcia*, 2003 MT 211, 317 Mont. 73, 75 P.3d 313 (2003).
 N.C.—*State v. Taylor*, 354 N.C. 28, 550 S.E.2d 141 (2001).
 S.D.—*State v. Gonzalez*, 2001 SD 47, 624 N.W.2d 836 (S.D. 2001).
Revocation of probation
 Ky.—*Hunt v. Com.*, 326 S.W.3d 437 (Ky. 2010).
- 2 N.C.—*State v. Taylor*, 354 N.C. 28, 550 S.E.2d 141 (2001).
Time sufficient
 Eleven months given to new counsel to prepare a defense for trial satisfied due process; the fact that one prospective defense attorney estimated he would need three years to properly prepare did not outweigh the facts that defendant's new lawyer did not request additional time, and the defense team included three attorneys, one of whom had been working on the case since its inception.
 Ariz.—*State v. Miller*, 234 Ariz. 31, 316 P.3d 1219 (2013), cert. denied, 134 S. Ct. 2668, 189 L. Ed. 2d 216 (2014).
- 3 U.S.—*U. S. ex rel. Molinas v. Mancusi*, 370 F.2d 601 (2d Cir. 1967); *U.S. v. McLemore*, 447 F. Supp. 1229 (E.D. Mich. 1978).
- 4 U.S.—*Ruiz v. Beto*, 433 F.2d 1368 (5th Cir. 1970).
- 5 U.S.—*McLawhorn v. State of N.C.*, 484 F.2d 1 (4th Cir. 1973).
 Fla.—*Sumbry v. State*, 310 So. 2d 445 (Fla. 2d DCA 1975).
- 6 U.S.—*Estrella v. U.S.*, 429 F.2d 397 (9th Cir. 1970).
- 7 U.S.—*Timmons v. Peyton*, 360 F.2d 327 (4th Cir. 1966).
- 8 U.S.—*U.S. v. Trapnell*, 638 F.2d 1016, 7 Fed. R. Evid. Serv. 1672 (7th Cir. 1980).
 Cal.—*People v. Seaton*, 26 Cal. 4th 598, 110 Cal. Rptr. 2d 441, 28 P.3d 175 (2001), as modified, (Sept. 26, 2001).
 N.C.—*State v. Taylor*, 354 N.C. 28, 550 S.E.2d 141 (2001).
- 9 U.S.—*Howard v. U.S.*, 580 F.2d 716 (5th Cir. 1978).

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PART VII. Constitutional Rights Applicable to Criminal Proceedings and Prosecutions

XVIII. Constitutional Rights within the Criminal Process; Searches and Arrest to Sentencing and Confinement

H. Time of Trial and Continuances

§ 1698. Continuances

[Topic Summary](#) | [References](#) | [Correlation Table](#)

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Every denial of a request for a continuance does not violate due process; only an arbitrary refusal is such a violation, and that question depends on the circumstances of each case, particularly in the reasons presented to the trial judge at the time the request is denied.

Because the matter of continuance is within the discretion of the trial court, every denial of a request for a continuance does not violate due process¹ even if the party fails to offer evidence² or is compelled to defend without counsel.³ The denial of a continuance may raise questions relative to defendant's Sixth Amendment right to counsel and the Fourteenth Amendment right to due process of law, which must be balanced against the public interest in the prompt and efficient administration of justice.⁴ Granting a continuance is one measure the court may use to protect an accused's due process rights.⁵

There may be no infringement of the accused's rights and hence no denial of due process where a denial of a continuance or further continuance is not an abuse of discretion;⁶ only an arbitrary refusal of a continuance is violative of due process.⁷ There are no mechanical tests for deciding when the denial of a continuance is so arbitrary as to violate defendant's right to due process,⁸ but the answer must be found in facts and circumstances of each case,⁹ particularly in the reasons presented to the trial judge at the time the request is denied.¹⁰ In addition, factors to consider when determining whether the denial of a continuance

was so arbitrary as to violate due process include the length of delay requested, prior continuances, inconvenience, the reasons for the delay, whether the defendant contributed to the delay, and other relevant factors.¹¹

The trial court's refusal to grant a continuance may be so arbitrary as to violate due process,¹² and the denial of a proper request for a continuance to prepare a defense constitutes a denial of due process¹³ as where defendant is not granted a continuance in order to secure a private attorney of his or her own choosing.¹⁴ However, the existence of due diligence on the part of a defendant, standing alone, does not determine whether a trial court's denial of the defendant's request for a continuance violates the defendant's constitutional right to due process.¹⁵ Failure to advise defendant of a continuance obtained by the prosecution violates defendant's due process rights.¹⁶

In various instances, refusing to grant¹⁷ or granting¹⁸ a continuance has been held not to violate defendant's due process rights.

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Footnotes

- 1 U.S.—*Ungar v. Sarafite*, 376 U.S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964).
Ark.—*Brown v. State*, 5 Ark. App. 181, 636 S.W.2d 286 (1982).
A.L.R. Library
[Continuances at instance of state public defender or appointed counsel over defendant's objections as excuse for denial of speedy trial](#), 16 A.L.R.4th 1283.
- 2 U.S.—*Ungar v. Sarafite*, 376 U.S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964).
R.I.—*State v. Dias*, 118 R.I. 499, 374 A.2d 1028 (1977).
- 3 U.S.—*Ungar v. Sarafite*, 376 U.S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964).
Ark.—*Brown v. State*, 5 Ark. App. 181, 636 S.W.2d 286 (1982).
- 4 Wis.—*State v. Wedgeworth*, 100 Wis. 2d 514, 302 N.W.2d 810 (1981).
As to due process right to counsel, see § 1680.
- 5 S.C.—*State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001) (overruled on other grounds by, *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005)).
- 6 U.S.—*Avery v. State of Alabama*, 308 U.S. 444, 60 S. Ct. 321, 84 L. Ed. 377 (1940).
Minn.—*State ex rel. Butler v. Swenson*, 243 Minn. 24, 66 N.W.2d 1 (1954).
Pa.—*Com. ex rel. Reynolds v. Burke*, 173 Pa. Super. 146, 96 A.2d 193 (1953).
- 7 U.S.—*U. S. ex rel. Lucas v. Regan*, 365 F. Supp. 1290 (E.D. N.Y. 1973), judgment aff'd, 503 F.2d 1 (2d Cir. 1974).
Pa.—*Com. v. Harding*, 245 Pa. Super. 333, 369 A.2d 429 (1976).
R.I.—*State v. Verry*, 102 A.3d 631 (R.I. 2014).
Denial of continuance arbitrary
The trial court's denial of defendant's motion for a substitution of retained counsel and a continuance was arbitrary and violated due process and defendant's Sixth Amendment right to counsel of choice in a prosecution for sexual assault of a child where although the trial court cited administration problems and the juvenile complainant's needs, the case was a simple one to try, only requiring three witnesses; the defendant had already retained new counsel, did not seek a lengthy continuance, and was clearly not simply trying to delay his trial as he would have remained in custody during the delay; nothing suggested that a continuance would have harmed or even inconvenienced the complainant; and the complainant's initial complaint came four to six years after the alleged assaults, and thus, he would not have appeared at risk for forgetting information a few months later.
U.S.—*Carlson v. Jess*, 526 F.3d 1018 (7th Cir. 2008).
- 8 U.S.—*Ungar v. Sarafite*, 376 U.S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964).
Cal.—*People v. Blake*, 105 Cal. App. 3d 619, 164 Cal. Rptr. 480 (1st Dist. 1980).
Conn.—*State v. Rivera*, 268 Conn. 351, 844 A.2d 191 (2004).
Pa.—*Com. v. Kittrell*, 285 Pa. Super. 464, 427 A.2d 1380 (1981).

- 9 U.S.—*Ungar v. Sarafite*, 376 U.S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964); U.S. v. *DeCoteau*, 648 F.2d 1191 (8th Cir. 1981).
- Wash.—*State v. Downing*, 151 Wash. 2d 265, 87 P.3d 1169 (2004).
- 10 U.S.—*Vaughn v. U.S.*, 435 U.S. 969, 98 S. Ct. 1608, 56 L. Ed. 2d 60 (1978).
- Cal.—*People v. Jenkins*, 22 Cal. 4th 900, 95 Cal. Rptr. 2d 377, 997 P.2d 1044 (2000), as modified, (June 28, 2000).
- Ohio—*State v. Green*, 90 Ohio St. 3d 352, 2000-Ohio-182, 738 N.E.2d 1208 (2000).
- 11 Ohio—*State v. Green*, 90 Ohio St. 3d 352, 2000-Ohio-182, 738 N.E.2d 1208 (2000).
- 12 U.S.—*Grigsby v. Mabry*, 637 F.2d 525 (8th Cir. 1980); U. S. ex rel. *Cole v. Follette*, 301 F. Supp. 1137 (S.D. N.Y. 1969), judgment aff'd, 421 F.2d 952 (2d Cir. 1970).
- Wash.—*State v. Downing*, 151 Wash. 2d 265, 87 P.3d 1169 (2004).
- 13 Cal.—*People v. Cruz*, 83 Cal. App. 3d 308, 147 Cal. Rptr. 740 (2d Dist. 1978).
- Mich.—*People v. Wilson*, 397 Mich. 76, 243 N.W.2d 257 (1976).
- Appointment of expert; analysis of evidence**
- Denying defense counsel's request for a continuance to review sex offender risk assessment report and to have expert appointed to help prepare for hearing and possibly to conduct an independent evaluation of defendant violated defendant's due process rights in sodomy prosecution where defense counsel received risk assessment report the day before the assessment hearing.
- Ky.—*Pendleton v. Com.*, 83 S.W.3d 522 (Ky. 2002).
- 14 U.S.—U. S. ex rel. *Cole v. Follette*, 421 F.2d 952 (2d Cir. 1970).
- Cal.—*People v. Johnson*, 5 Cal. App. 3d 851, 85 Cal. Rptr. 485 (4th Dist. 1970).
- Tex.—*Brown v. State*, 630 S.W.2d 876 (Tex. App. Fort Worth 1982).
- 15 Wash.—*State v. Downing*, 151 Wash. 2d 265, 87 P.3d 1169 (2004).
- Diligence in securing witness attendance**
- Even in a capital case, if the defendant cannot show that he or she has been diligent in securing the attendance of witnesses, the denial of a request for a continuance does not support a claim of a violation of the defendant's due process rights.
- Cal.—*People v. Jenkins*, 22 Cal. 4th 900, 95 Cal. Rptr. 2d 377, 997 P.2d 1044 (2000), as modified, (June 28, 2000).
- 16 Ill.—*Village of North Pekin v. Riviere*, 73 Ill. App. 3d 1032, 29 Ill. Dec. 882, 392 N.E.2d 439 (3d Dist. 1979).
- 17 U.S.—*Johnson v. Wyrick*, 653 F.2d 1234 (8th Cir. 1981).
- Ill.—*People v. Handley*, 51 Ill. App. 3d 68, 9 Ill. Dec. 148, 366 N.E.2d 405 (1st Dist. 1977).
- N.C.—*State v. Chambers*, 53 N.C. App. 358, 280 S.E.2d 636 (1981).
- Pa.—*Com. v. Scott*, 469 Pa. 258, 365 A.2d 140 (1976).
- Appointment of counsel; effective representation**
- Denial of continuance in connection with defendant's decision to retain third attorney few weeks before trial commenced did not violate defendant's due process rights where defendant was represented by attorney whose representation was not shown to be other than exemplary after first attorney was disqualified, district court informed third attorney before representation began that no continuance would be granted if defendant changed attorneys, and third attorney nonetheless replaced second attorney, making no formal request for continuance.
- U.S.—*U.S. v. Bailey*, 327 F.3d 1131, 61 Fed. R. Evid. Serv. 853 (10th Cir. 2003).
- Obtaining testimony**
- In prosecution for plotting to place bombs on board aircraft in foreign commerce, denial of defendants' request for adjournment, in order to obtain testimony of Philippine judge for purpose of impeaching testimony of two Philippine police officers, did not deprive defendants of due process; judge's testimony would have been cumulative inasmuch as one officer had already admitted in court that he provided false information to judge.
- U.S.—*U.S. v. Yousef*, 327 F.3d 56, 61 Fed. R. Evid. Serv. 251 (2d Cir. 2003).
- 18 U.S.—*Johnson v. Overberg*, 639 F.2d 326, 22 Ohio Op. 3d 326 (6th Cir. 1981).
- Conn.—*Antrum v. State*, 185 Conn. 118, 440 A.2d 839 (1981).